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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

NO. 76.

WISCONSIN CENTRAL RAILROAD CO.

v.

PRICE COUNTY ET AL.

IN ERROR TO THE SUPREME COURT OF WISCONSIN.

BRIEF IN REPLY FOR PLAINTIFF IN ERROR.

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The defendants rest their case mainly upon a denial of the propositions of law asserted by the plaintiff and of the facts found by the court. Some of defendants' arguments seem to confess the positions taken by the plaintiff, and attempt to avoid them.

We shall consider:

I. Defendants' denials of plaintiff's propositions.

II. The new matter.

I.

The Denial of Plaintiff's Propositions.

We shall take up those of our own propositions which are controverted in the order in which they are presented by our first brief, and consider in connection with each, the grounds upon which they are assailed.

A.

The lieu lands were exempt from taxation because their selection had never been approved by the Secretary of the Interior, without which they could not be identified and segregated from the public domain.

1. The defendants deny that the approval of the Secretary was necessary: —

(*a.*) Because the withdrawal of the lands from sale, in 1869, of itself, gave an equitable interest in them to the railroad company.

But the effect of the withdrawal of the lands within the indemnity strip from sale was not an appropriation of them to the railroad company. It was merely notice to the world that they could not be appropriated under the general land laws. The withdrawal itself in no way increased the rights of the plaintiff or diminished the rights of the public.[1]

(*b.*) Because all the undisposed of land within the indemnity limits would not more than indemnify the plaintiff for the lost lands, and that hence there is no occasion for selection.

But this argument, aside from other objections, involves an assumption of fact for which there is not the slightest foundation in the evidence.

We have heretofore contended that even if the Secretary's decision that there was no deficiency in the place limits could, by some legal legerdemain, be transformed into an exactly opposite decision, still the fact remained that the Secretary had given no decision upon the other vital question, viz., whether the lands designated in the application could properly be taken to supply the deficiency.[2] The defendants now attempt to get over this difficulty by asserting that there was nothing left for the Secretary to decide on this point. They assume that the railroad company were entitled to all the

[1] "The order of withdrawal of lands along the 'probable lines' of the defendant's road, made on the 19th of March, 1863, by the Commissioner of the General Land Office, affected no rights which, without it, would have been acquired to the lands, nor in any respect controlled the subsequent grant." — Mr. Justice FIELD in *Kansas Pacific R. Co.* v. *Atchison, etc., R. R.*, 112 U. S. 414, 422.

"It is true that in some cases the statute requires the land department to withdraw the lands within these secondary limits from market, and in others the officers do so voluntarily. This, however, is to give the company a reasonable time to ascertain their deficiencies and make their selections.

"It by no means implies a vested right in said company inconsistent with the right of the government to sell, or of any other company to select, which has the same right of selection within those limits." — Mr. Justice MILLER, in *St. Paul R. R.* v. *Winona R. R.*, 112 U. S. 720, p. 732.

[2] Plaintiff's first brief, pp. 20–22.

vacant lands in the indemnity belt, on the supposition that all these lands were not sufficient to supply the deficiency in the place limits. Hence they argue that it was not material for the Secretary to inquire whether the indemnity lands selected by plaintiff were situated in the part of the indemnity belt nearest the tiers of sections lost in the place limits. But, if we assume, for the sake of argument, that the plaintiff was entitled to all the vacant lands in the indemnity belt, still the question remained whether all the lands designated in plaintiff's list were in fact vacant, *i. e.* free from adverse claims arising under prior governmental disposition. This is one of the most important questions confided to the judgment of the Secretary, and its determination is a matter of consequence to citizens who have settled on these lands, as well as to the government itself. The defendants take the somewhat novel position that the results arrived at on this question by the subordinate officials in the local land offices "*were conclusive*," [1] and left nothing whatever of a judicial nature to be done by the Secretary. This position can hardly require extended refutation at our hands. It reduces the Secretary to a mere figure-head, and affirms that the official upon whom this duty was specially imposed cannot review the work of his subordinates. Of course, the Secretary may, if he chooses, adopt the lists prepared by the local officers; but he is not bound to do so, nor can the Court judicially know whether he would or would not have done so if he had got so far as that question in the present case.

(*c.*) Because the lands to be taken were already certain, — namely, the number of acres equal to those lost, — lying nearest to the place limits.

But this argument disregards the fact that there may be questions as to what number of acres claimant is entitled to, what land within the indemnity limits still belongs to the United States, and which of several parcels equidistant from the place limits should be taken.

(*d.*) Because the duty of making selections being left to the State, the plaintiff has performed all things on its part to be performed when it builds the railroad, and thereafter can enforce as against the United States, by appropriate proceedings in the courts, the issuance of patents, despite the refusal of the Secretary, which must be assumed to be capricious.

But selection is essential to the existence of a title, both because it is essential to identification, and furthermore, because it is a condition precedent to the right to a patent; and a claimant can acquire

[1] Defendants' additional brief, p. 10.

no rights before the conditions are complied with, although they are to be performed by a third person. Besides, even if every condition were performed, no power would exist to compel the issuance of a patent.

Defendants assert that "the plaintiff could enforce its claim to the lands in a suit against the United States," under the Act of March 3, 1887, but —

First: The Act of March 3, 1887, was not in force four years before its passage, when this tax was assessed.

Second: The defendants have overlooked the decision of this court in *United States* v. *Jones*, 131 U. S. 1, where it was held that the Act of 1887 does not authorize the maintenance of an action to compel the issue of a patent.[1]

(*e.*) Because an equitable title is taxable, and approval is only necessary to the passing of the legal title.

But no case has gone further than to hold a "perfect equitable title" taxable, and it is impossible to consider that to be a perfect equitable title which is a float merely, and as indeterminate in quantity as it is in space. The right in the indemnity lands which the railroad company acquires by virtue of the act, the construction of the railroad and the deficiency within place limits, is merely an inchoate interest.

The defendants undertake to reduce the prerequisite of the Secretary's approval to the level of a mere formal ceremony, a "mere technicality," having no bearing on the substantial rights of the parties. They say that the approval is a condition precedent only to the perfecting of *the legal title*, and that the absence of approval does not affect *the equitable title*. The statute affords no foundation for this argument. If there is anything in the statute which is matter of substance, it is this requisite of approval. Without approval there is no title in the plaintiff which would be enforced against the United States by a court of equity, even if the government were suable to the same extent as an individual.[2]

The phrase "equitable right," or "equitable title," is ambiguous,

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[1] Defendants say that the cases arising under the New Madrid Act (cited in plaintiff's first brief, page 37), which hold that where by statute certain action on the part of government officers is made a condition precedent to the vesting of rights, the neglect or refusal by the government officers to perform such duty will not waive the condition, "have no application here for the reason that *no consideration* was paid nor to be paid for the privileges granted. No contract relations existed between the government and the parties interested." It is difficult to see why an exchange of one parcel for another is not a valid consideration, and impossible to comprehend why the agreements of the government to pay the postmaster's additional compensation in *United States* v. *McLean*, 95 U. S. 750, 753, and *United States* v. *Wright*, 11 Wall. 648, did not create "contract relations" upon valid "considerations." See also *Kihlberg* v. *United States*, 97 U. S. 398.

[2] Plaintiff's first brief, pp. 22, 23, 34.

and its use leads to confusion. "Equitable" and "equity" are sometimes used in their popular or lay signification as denoting what is absolutely right or just; *i. e.*, as co-extensive with the moral law. They are also used in a very different sense as descriptive of that class of judicially enforceable rights which are enforceable through the medium of a court of equity, as distinguished from rights enforceable through a court of law. If defendants say that plaintiff had equitable right or title in first sense, we demur, *i. e.*, we reply that this is irrelevant. If they say that plaintiff had equitable right or title in the second sense, we deny the fact. The plaintiff had no right or title as against the United States which could be judicially enforced or declared. Hence it had no right or title in the proper legal sense of those terms, as used either by a court of law or by a court of equity. "An unenforceable right" is a misnomer. Legal principle and propriety of language are both set at naught when that is called a "legal right" which is not judicially enforceable, nor even judicially declarable.

Defendants assert that in the cases cited by us holding approval essential to the acquisition of title, "only the legal title to indemnity land was under consideration." In fact, no distinction was made in any of the cases between the legal and the equitable title; but the controversies all involved the question who should be considered the beneficial owners of the land.[1]

2. The defendants deny that the approval of the Secretary was lacking —

(*a.*) Because the registers and receivers had examined and certified as correct the list of selections transmitted to the Secretary, who in the multiplicity of his duties could not possibly revise them.

But the act called for approval by the Secretary, and not by the registers and receivers; else why should it have called for transmission of the documents to Washington at all?

On this question, *Dickins v. Mahana*, 21 How. 276, and *Ex parte Forbes*, 1 Dill. 363, are directly in point for plaintiff.

[1] The defendants object that "no one but the plaintiff has questioned the proceedings taken prior to 1883 to give precision to the plaintiff's title to these indemnity lands. The United States have never raised the question" and "that the plaintiff makes this claim "for the Secretary of the Interior." It may be answered: *First*, the Secretary of the Interior was most strenuous in making the claim that the plaintiff never became entitled to the lands; and *secondly*, taxation can only be justified by proof of a perfect equitable title, and if such title is not shown, it is immaterial that the government has not enforced its rights. For instance, in *Railroad Co.* v. *McShane*, 22 Wall. 444, 463, it was specifically found that the government did not assert the claim, on account of which the lands were held to be exempt from taxation.

(*b.*) Because when the Secretary declared that he would not consider the lists at all, as plaintiff was not entitled to any more land, he, in effect, declared that if plaintiff was entitled to any land, the selections made met with his approval.

But this argument rests upon an implication which is diametrically opposed to the facts. The fiction of implied approval will not be invoked in face of the fact of express disapproval.

The defendants say that the Secretary virtually replied, "Your selections are all right, . . . but you cannot have them because your quota is full." We submit that the Secretary virtually replied, "Your quota is full; and therefore I will not consider the question whether your selections are right or not."

The defendants contend that Secretary Schurz judicially determined that there was a large deficiency in the place limits. In fact the Secretary judicially determined that instead of there being any deficiency, the railroad company had received a large quantity of land "in excess of what it is entitled to," and called upon the company to relinquish its claim to this excess. (Record, folio 240–241.)

We suppose what the defendants mean to say is, that this decision, being founded on an erroneous legal reason, must be regarded as if it had been the exact opposite of what it actually was. If so, this is merely a reiteration of the view taken in the Wisconsin opinion, viz., that inasmuch as the decision of the Secretary was founded on a "mistaken notion" which "can no longer be entertained," the decision must now be regarded as if it had been the exact opposite of what it actually was. This view is clearly unsound. It could not be supported even if the point upon which the Secretary mistook the law had been the only point necessary to be made out in order to obtain from him a decision approving the selections. Because a mistaken notion "can no longer be entertained," it does not follow that all decisions rendered under that mistaken notion are to be treated as though they had never been made, much less that they are to be treated as having been the exact opposite of what they really were. The historical fact that the Secretary refused, in 1877, to approve the selections, is not obliterated by the discovery in 1885 that there was no good ground for his refusal. We are not concerned here with the fact that a certain mistaken notion "can no longer be entertained." What concerns us is the fact that this mistaken notion *was* once entertained and that we were thus prevented from perfecting our claim to the land. The subsequent exposure of the erroneous reason for our deprivation does not alter the fact that we were thus prevented, nor does it justify the State in requiring us to pay taxes during the period of our exclusion.

The defendants rely upon the fact that the objection taken by the Secretary "has since been overruled by this court. *Winona, etc.*, v. *Barney*, 113 U. S. 618. But the *Winona* case was not an appeal

from the decision of the Secretary in this case, nor had this court any appellate power over the Secretary. The defendants, in effect, assert that the erroneous decision of the Secretary reversed itself as soon as the error was made plain by the decision of another tribunal in another case, and that, moreover, such reversal had a retroactive effect.

3. The defendants deny that there was no waiver of the prerequisite of the Secretary's approval —

(*a.*) Because he made no objection to the particular descriptions selected.

But having stated an objection which disposed of the lands selected, he had no occasion to consider all the objections applicable to each parcel. The declaration of one ground of refusal is not inconsistent with the right to rely upon another also, and hence is no waiver of that other.

(*b.*) Because the proof that the lists of selections were properly made up was conclusive; that a disapproval by the Secretary in face of them would have been an abuse of discretion; that therefore the court will say that there is no proof of disapproval, and that hence, not having disapproved the list of selections when offered he must be deemed to have waived any objections.

But this argument proceeds upon a series of erroneous statements of facts and unsound conclusions of law.

The defendants contend that "the government will be sustained only in a *reasonable* enforcement of this condition"; that the Secretary "must be supported by some substantial reason," and that he cannot act "arbitrarily."

The answer to this argument is to be found in the cases decided in this court and elsewhere.[1] The Secretary's decision is conclusive as between the railroad company and the United States, and cannot be impeached for mistake, unless the so-called "mistake" is so gross as necessarily to imply fraud. Moreover, it is not sufficient for defendants' purpose here to impeach and nullify the Secretary's decision disapproving the selections. In order to vest even an equitable title in the plaintiffs, it was necessary, not that there should merely be no disapproval, but that there should be an affirmative judgment of approval.[2]

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[1] Plaintiff's first brief, p. 34.

[2] The mere issuing of a patent is an "approval"; but where no patent has issued, affirmative evidence of approval must be adduced. If affirmative evidence of disapproval were required, that adduced in this case would have been sufficient for the purposes of establishing plaintiff's case, even if it had been informal. *U. S.* v. *Milwaukee and St. Paul R. R. Co.*, 5 Biss. 410.

B.

Both lieu lands and place lands were exempt from taxation because the United States refused to part with its interest in the lands, and not merely disputed the claim of the plaintiff to them, but also denied to the plaintiff the enjoyment thereof.

The defendants deny this proposition, but they do not attempt to answer the arguments advanced by us. They admit that some of the authorities cited by us are in point, and content themselves with the suggestion that if a State is satisfied to adopt through its own courts such a rule of law, it alone should bear the misfortune thereof.

The case of *Carroll* v. *Safford*, 3 How. 441, did not enunciate any new proposition of substantive law. It simply decided that the court would, in the absence of conflicting evidence, accept a final certificate as satisfactory evidence that the United States had parted with all its interest in the land. There is nothing in the decision to give countenance to the notion that a State court may anticipate the action of the land department, and, before issuance of a patent, declare an individual to be entitled thereto. *Marquez* v. *Frisbie*, 101 U. S. 473.

C.

The doctrine of relation cannot be invoked to render valid the taxation of the lands.

The defendants deny this —

1. On the ground that when the Wisconsin patent issued to plaintiff, the title then acquired dated back to the completion of the railroad, if not earlier.

But this argument entirely overlooks the principles upon which the doctrine of relation is applied.[1]

2. Because, after the judgment below, a patent for these lands issued by the United States to the railroad company.

But this fact does not appear of record, and the court cannot take judicial notice of it.

The defendants claim that inasmuch as the United States granted patents to the plaintiff several years subsequent to this assessment, the doctrine of relation of title may be applied to validate the taxation. They contend that, upon the issuance of the patent, "the title related back to the date of the first step, viz., the date of the grant." We think that this position is sufficiently answered by the reasoning and authorities in plaintiff's first brief, pages 53–56, and also by the recent decision in *Churchill* v. *Sowards*, Supreme Court of Iowa, 43 North Western Reporter, 271. We will, however, state some further objections to this attempted application of the doctrine of relation.

First: The argument proves too much. It would validate a tax assessed at the date of the location of the route and before the construction of a single foot of the road, — a result for which no one contends.

Second: The levy of a tax on the land is an adversary proceeding, so far as concerns any present or prospective owners, or any persons having a possibility of acquisition or an expectation of future ownership. The municipalities thus levying the tax do not stand "in privity" with the plaintiff within the meaning of that phrase as used in *Gibson* v. *Chouteau*, 13 Wallace, 92, 101.[2]

Third: The defendants' argument proceeds upon a total misapprehension of the true nature of the so-called "doctrine of relation." When it is said by courts, "that the title relates back to the date of the first step," the real meaning is not that the land is considered as having become the property of the grantee at the earlier date, but merely that the court will take notice of the inception of the grantee's attempt to acquire title, and will regard it as affording ground

[1] Plaintiff's first brief, pages 53–56.

[2] As to the relation of the plaintiff to a tax-title purchaser, see remarks of Judge *Dillon*, quoted in plaintiff's first brief, page 56.

for preferring his subsequently acquired title as against the claims of intervening incumbrances.

We do not need, however, in this case to criticise the form in which this doctrine is sometimes expressed; for it is perfectly well settled in regard to all legal fictions, and especially in regard to this doctrine of relation, that

"wherever a fiction of law works injustice, and the facts, which by fiction are supposed to exist, are inconsistent with the real facts, a court of law ought to look to the real facts." [1]

"No fiction shall extend to work an injury, its proper operation being to prevent a mischief, or remedy an inconvenience which might result from the general rule of law." [2]

"The court would not endure that a mere form, or fiction of law, introduced for the sake of justice, should work a wrong, contrary to the real truth and substance of the thing." [3]

In short, the fiction is applied as a medicine to cure, not as a poison to kill.

But although this doctrine stated in the form of a fiction does not harm us, we venture to suggest, in the interest of correct legal phraseology, that it is quite unnecessary to employ any fiction about the matter. The ends of justice may be served equally well by dispensing with the fiction, and substituting a true statement. The same results to secure which the fiction has been employed may be attained without it. Most legal fictions are merely obscure and roundabout methods of expressing legal propositions which would be better stated without making use of the clumsy device of a fiction.[4]

Instead of saying that the title relates back so as to cut off intervening incumbrances, or that the title is to be considered, for certain purposes, as having been acquired at the inception of the effort to acquire it, why is it not as well (and better) to say that a title finally acquired is not subject to be defeated by new interests in the land created while such title was in legal process of acquisition; or that, taking the proper steps to initiate a proceeding to acquire title will give such title when finally acquired a preference over new interests in the land attempted to be created subsequently to the inception of the proceedings; or that the ripening of an inchoate interest into a perfect title cannot be presented by the attempt to create new interests subsequently to the inception of the inchoate interest?

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[1] Broom's Maxims, 130.

[2] Blackstone's Commentaries, 43.

[3] Lord Mansfield in , 2 Burr, 962.

[4] "Not a fiction but is capable of being translated, and occasionally is translated, into the language of truth. Burn the original, . . . and employ the translation in its stead. Fiction is no more necessary to justice than poison is to sustenance." —2 Bentham, Rationale of Judicial Evidence, 688.

Certain "intricate fictions" may be dispensed with. "They are merely the scaffolding behind which the house was built, and now that the house is convenient, and proximately complete, the scaffold may be taken down." — Stephen's Digest of Criminal Law, Note XVI., page 404.

D.

The doctrine of grants in præsenti *cannot be invoked to render valid the taxation of the land.*

The defendants deny this —

On the ground that the effect of the act was to appropriate to the use of the railroad company all the land within indemnity as well as within place limits.

But defendants overlook entirely the distinctions between indemnity and place lands, and those between different classes of land grant acts.[1] They fail to distinguish between

(1.) Acts like the swamp land acts conveying the full title to the land at the date of the act, where, the land being fully described by quality, the doctrine of *certum est quod certum reddi potest* is applied, and the land granted is definitely determined at the date of the act.

(2.) Acts like those construed in *Lessieur* v. *Price*, 12 How. 59, and *Rutherford* v. *Greene*, 2 Wheat. 196, where the grant is definite in quantity and becomes definite in place as soon as a selection is made by the claimant, or a survey by a third person.

(3.) Acts like those construed in *Rector* v. *Ashley*, 6 Wall. 142, which call for the performance of conditions by both the claimant and the government, before they become effective to pass the title, and operate until such performance at most to prevent the acquisition of title by another.

The acquisition of title by plaintiff to the lands under the Act of May 5, 1864, differs entirely from the acquisition of title to swamp lands under the Act of Sept. 28, 1850, construed in *Wright* v. *Roseberry*, 121 U. S. 488, 495, 505. In the swamp land act there is, in the first section, a present and unqualified grant of all lands of a particular description. That grant is in no way made dependent on any future state of facts. It is not a grant of such swamp lands as may hereafter be selected by the State and approved by the Secretary of the Interior. Nor is it to be earned by any future labor on the part of the States. "The Act of Congress describes the land, not by specific boundaries, but by its quality, and is a legislative grant of all the public lands within the State of the quality mentioned." The courts say that "the provision of the second section, that the Secretary of the Interior should make out and transmit to the governor a list and plats of the land described, and at the request of the

[1] Plaintiff's first brief, pages 57-60.

governor cause a patent to issue to the State; and that 'on that patent the fee simple to said lands shall vest in the said State,' can no more be held to limit the effect of the present grant in the first section, than if, in a deed, after immediate and express conveyance of lands by some general description, it should be provided that, when the numbers should be ascertained, another deed should be made 'on which the fee simple should vest.'"[1]

Under the swamp land act the patent is mere matter of evidence and description by metes and bounds. The identification by the Secretary and the issuance of the patent are chiefly useful as diminishing the chances and expense of litigation, saving the necessity of procuring proof *aliunde* of the character of the land.[2]

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[1] Branch *v.* Mitchell, 24 Ark. 431, 444, 445.

[2] The swamp land act, Sect 1, declares that "the wholeof those swamp and overflowed lands made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby granted to said State." Sect. 2 provides "that it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the land described, etc." It will be noted: *First.* That the land granted is here accurately defined by quality, and not left as in case of indemnity lands to subsequent selection. *Second.* That the obligation of "making lists and plats" is directory merely, and is to follow, not to precede, the passing of the beneficial interest. *Third.* In those cases there was merely a neglect of the Secretary to act, and in the absence of such action, the court simply substitute the adjudication of the fact by some other tribunal upon competent evidence. Here the Secretary has acted, and it is sought not merely to set aside his decision, but to enter a decision to the opposite effect without any evidence on which to base it. *Fourth.* That the question at issue in the swamp land cases was not whether the grantees under the swamp land act had acquired a perfect equitable title so as to be taxable, but whether any interest had attached under the act which gave the grantee precedence over claimants under subsequent acts of Congress, or under the homestead and pre-emption laws. It may also be questioned whether in view of the numerous controversies which have arisen under the swamp land act, the courts would now be disposed to establish a similar construction of acts relating to a different subject matter.

E.

The objection that plaintiff did not have an interest in the land necessary to maintain the suit cannot prevail to defeat this writ of error.

The defendants deny this, and assert that if the lands were not taxable in 1883, it was because the plaintiff did not have then a perfect equitable title, and that if it did not, plaintiff had no standing in this court.

But, in the first place, we sue on the title of 1884, and complain of certain action taken in 1883, and by statute the Wisconsin patent was made presumptive evidence of an absolute title on the day of its date. In the second place, while land is taxable only if there is a perfect equitable title in the grantee, a grantee may bring a bill to remove a cloud if he has an interest less than a perfect equitable title. Such was the position of the plaintiff in *Railroad Co.* v. *Prescott*, 16 Wall. 603, *Railway Co.* v. *McShane*, 22 Wall. 444, and *Northern Pacific R. R. Co.* v. *Traill County*, 115 U. S. 600.

In the third place, this objection, not having been made in the State court, cannot now be taken here.[1]

(*a*). *Defendants' objection, if open, is not tenable.*

The defendants put, in substance, this dilemma: —

Either, first, the plaintiff, in 1883, was possessed of the full, equitable, beneficial title, and hence the lands were then taxable;

Or, secondly, the plaintiff, at the time of the commencement of this suit, was a stranger to the lands, and hence must go out of court with costs.

We reply that the plaintiff is not obliged to adopt either horn of this dilemma. In 1883, the plaintiff, though not owner, was not an entire stranger to the lands. The plaintiff, though not then the owner of the lands, had taken preliminary steps towards the ultimate acquisition of title. The possibility of its acquisition of the land was such as to justify the plaintiff in asking the court to protect, against the wrongful acts of third persons, the estate which it was itself seeking to acquire. This contingent interest, this possibility of future acquisition, was a very different thing from present ownership, and did not justify the State in taxing the lands upon the theory that they had already become the property of the plaintiff. But, although the initiation of proceedings for the ultimate acquisition of title gave the plaintiff no property in or pos-

[1] See plaintiff's first brief, pages 16, 17.

session of the lands, it nevertheless gave it a standing in court to prevent third persons from rendering the title valueless before its acquisition by the plaintiff; it gave plaintiff an interest in preserving the title undestroyed and unclouded during the pendency of its efforts ultimately to obtain it. The plaintiff had taken such steps towards the future acquisition of title from the United States as gave it a recognizable interest in preventing the State from annihilating or impairing the title of the United States, or in preventing a cloud from being cast upon the title.

Incipient or inchoate interests, though it is entirely uncertain whether they will ever ripen into ownership, will be protected against the wrongful acts of third persons.

Thus it is held that persons who have only an "estate in expectancy" may "be permitted to do whatever is necessary to protect it from forfeiture or incumbrance."

Pike v. *Wassell*, 94 U. S. 711, p. 715.

One who has no interest save that of a contingent remainderman may have an injunction to prevent the commission of waste.

Brashear v. *Macey*, 3 J. J. Marshall (K'y.), 89, 92, 93.

So the good will of renewal of a lease is an interest protected by a court of equity against third persons, although the renewal depends upon the mere volition of the landlord. See Mr. Justice Swayne, in *Davis* v. *Gray*, 16 Wallace, 203, 227, 228.

In *Phyfe* v. *Wardell*, 5 Paige, 268, 279, Chancellor Walworth said: "Although as between landlord and tenant, the complainant had no legal or equitable right to renewal, as it depended upon the mere volition of the landlord, yet, in regard to third persons, he had an interest which a court of equity recognizes as a valuable and vendible interest.'

In *Armour* v. *Alexander*, 10 Paige, 571, 572, 573, the same principle was applied to the good will of the State to give to actual settlers the benefit of their improvements and the pre-emptive right to purchase the lands upon which they have settled; although "as between the people of the State and these settlers upon Indian lands, the settlers had no legal rights, or any other rights except such as depended upon the good will of the Legislature."

Although an occupant, "with a view to pre-emption," has no vested right to the land as against the government, yet he may be protected by the courts against the claims of other persons who have not an equal or superior right.

See *Frisbie* v. *Whitney*, 9 Wallace, 187.

(*b.*) *The objection to plaintiff's standing in court is not open to defendant.*

The objection that the plaintiff has not such an interest as entitles it to maintain the bill, is not now open to the defendants; nor the objection that the case is not one of equitable jurisdiction. These points were not taken in the State court, and cannot be raised for the first time in the United States Supreme Court.

If the Federal question, as to the taxability of the land, was erroneously decided in the State court, the judgment must be reversed. The judgment for defendants cannot be affirmed on the ground that there was a point of local law on which the case *might have been* decided for defendants, if the State court did not in fact decide that point.

The United States Supreme Court may inquire "whether there is any other matter or issue adjudged by the State court which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue." But if "there has been no decision by the State court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the Federal question, then this court will reverse the judgment of the State court, and will either render such judgment here as the State court should have rendered, or remand the case to that court, as the circumstances of the case may require." *Murdock* v. *City of Memphis*, 20 Wallace, 590, 635, 636. In order to justify affirmance, there must exist other matters in the record "actually decided by the State court," which are sufficient to maintain the judgment of that court, notwithstanding the error in deciding the Federal question. It is not enough that the United States Supreme Court can see that there was a point of local law which *should have been* raised in the State court, and which *might have been* there decided. It must appear that it *was* there raised and *was* there decided.

No objections to the competency of the plaintiffs, or to the jurisdiction of a court of equity over the subject matter, were taken in the State court. No decision was rendered by the State court on these points. Hence these objections, even if intrinsically sound, cannot now be urged in the United States Supreme Court as reasons for affirming the judgment of the State court.

II.

The New Matter.

Defendants invoke the doctrine of estoppel to sustain the taxability of the lands.

They assert that the doctrine acts in two ways: —

A. As preventing the government from asserting that the Secretary did not approve of the selections.

B. As preventing the plaintiff from asserting that it did not have a perfect equitable title in 1883.

Both these contentions are unsound.

A.

The government is not estopped by the action of the Secretary of the Interior.

None of the elements of estoppel *in pais* exist. There is not a misrepresentation of an existing fact; there is no representation at all on which either plaintiff or defendants have acted; there is no injury. All that can be said is, that the Secretary did not enable the plaintiff to realize its hope that it would acquire patents for the land. Besides, it may be doubted whether the doctrine of estoppel *in pais* can be invoked as against the United States.

B.

The plaintiff is not estopped by its own action.

The defendants base the claim of estoppel upon —

1. The fact that the plaintiff filed lists selecting the lands.

2. The alleged sale of timber.

3. The acceptance of a patent for the lands from the State of Wisconsin.

The elements on which an estoppel must rest are not found here.

1.

The fact that plaintiff filed lists of selections is not a representation that it had acquired a title to the land, but merely evidence that it desired to acquire such title. The officers might well assume the correctness of plaintiff's claim as evidenced by such filing; but the claim was not that it had, but merely that it hoped to get, a title. Such filing was not made with the intention that defendants should act upon it by taxing the land. And the fact that they did assess the land cannot be deemed a "detriment" within the rule. The filing of selections cannot be treated as equivalent to a return of property to the assessors as liable to taxation.

2.

There is nothing in the evidence about possession to estop the plaintiff from proving and relying on the true state of facts relative to the ownership of the lands.

The plaintiff was not, and never had been, in possession. The trial judge specifically found the fact "that all the lands described in the plaintiff's complaint are wild, unoccupied and unimproved." (Record, folio 72.) He also found as a fact that "the lands described in the complaint in this action, together with a large quantity of other lands, as well as the patents therefor, were withheld from the State and the plaintiff by the Secretary of the Interior." (Record, folio 75). So far as there is any controversy of fact we suppose these findings are conclusive, and they were evidently so regarded by the Supreme Court of Wisconsin.

If, however, the Court see fit to go behind the judge's findings of

fact, and examine the testimony, they will discover nothing in it to justify a different conclusion.

Edward Rutledge testified (Record, pages 208–211, folio 334–338½) that, about 1882, he had an "option" on the timber on some of these lands. (Folio 335.) He said, "We simply paid the company for this timber with the understanding that if the company got patents for these lands, or title, that we should have the timber." (Folio 335.) This testimony certainly did not show possession in the company. The agreement above stated between the company and Rutledge did not putport to be based upon the assumption that the company were then in possession, or upon the assumption that the company had a right to take immediate possession; but just the reverse. Neither did the agreement purport to confer upon Rutledge any authority to take possession. The subsequent fact that Rutledge did illegally enter upon certain sections and cut the timber cannot prejudice the company. It was the act of Rutledge alone, not ordered or authorized by the company. Rutledge testified that he never said anything to the company about cutting the timber. (Folio 336.) In answer to the question whether there was an understanding between him and the company that he might go on and cut it when he pleased, Rutledge testified: "Well, I think there was never any understanding about it. We simply put our money against that timber — those estimates — with the understanding that when they got patents for the land we should have the timber. From my knowledge we never had the scratch of a pen from the company up to that time. We simply had a receipt for the timber." (Record, folio, 337.) Whether *Rutledge* would be estopped to claim that the land is the property of the United States is not the question. Certainly these plaintiffs are not so estopped; they have never occupied nor authorized Rutledge or any one else to occupy.

(The testimony of McDonnell [Record, folio 339–344] was stricken out, and the exception taken at the trial to its exclusion was not incorporated in the bill of exceptions. Hence we refrain from commenting on the testimony of that witness.)

Even if it had been found that there was possession by plaintiff of the tracts referred to by Rutledge, and that such possession operated as an estoppel, still this estoppel would apply only as to the part actually possessed, a very inconsiderable portion of the entire lands in question.

We may add, however, that in *Railway Company* v. *McShane*, 22 Wall. 444, 447, the land was held exempt from taxation, although "it appeared that at the date of the levy and assessment of the tax in question, the company had dealt with the lands, and was now dealing with them, as if they were in all respect their absolute property. They had mortgaged them as we have already stated; were now advertising and selling them."

3.

It is argued that the acceptance by the plaintiff in 1884 of a patent from the State of Wisconsin estops plaintiff from denying that the lands were taxable in 1883.

This argument is untenable. The "patent" was merely a quit-claim deed from the State. (Record, folio 249–251.) The acceptance of a quit-claim deed has never been supposed to imply an admission that the releaser had a perfect title. But, even if the acceptance of the quit-claim in 1884 had been accompanied by a solemn admission on the plaintiff's part that the title was then in the State, this could not estop the plaintiff from showing that the United States, and not the State, was the owner of the land in 1883 (the date of this assessment). The action of the assessors in 1883 could not have been taken in consequence of the subsequent action of the plaintiffs in the following year, 1884. Hence there would be no estoppel to prevent the plaintiff from showing the true state of the title at the date of the assessment in 1883.

Furthermore, it does not appear that either party to the quit-claim deed, or the defendants, or any other persons, were misled thereby. The State did not suppose it was conveying a perfect title, nor did the plaintiff suppose that it was receiving a perfect title. The only benefit looked for was strengthening the plaintiff's standing in court as against persons attempting to trespass on the lands under assumed tax titles or under no title at all. The Wisconsin statute made the patent "presumptive evidence" that the grantee "became vested thereby at the date thereof" with title to the lands. Under this statute it was supposed that the patent would give the plaintiff a *status* which would be recognized by the courts of Wisconsin as entitling it to obtain judicial assistance to prevent trespassers claiming under pretended tax deeds from stripping the lands. (See testimony of Mr. Abbot, Record, folio 124 and 133.) No one understood or claimed that the relations between the United States and the railroad company were altered by the issuance or acceptance of the State patent.

Whether plaintiff can dispute State taxes assessed at dates subsequent to the State patent, is a question which is not now before the Court; and is not likely ever to come before it.

III.

The Nature of the Interest Taxed.

Defendants say (additional brief, page 13): "The question here is not *what property* is taxable, but what was the nature of the plaintiff's interest in the lands in 1883. If the Court determines that the plaintiff then had a 'property' interest in the lands, the Wisconsin statute steps in and makes them taxable."

But we submit that the Wisconsin statute cannot step in and tax the lands, nor tax the plaintiff on account of the lands, if the lands were still the property of the United States. The State cannot tax any interest in government lands. If Wisconsin cannot tax the fee simple in the lands, it cannot tax any lesser interest. If it cannot tax the land *as* land, it cannot tax the plaintiff on account of its having taken incipient steps towards the ultimate acquisition of title to the land.

It is, however, unnecessary to discuss here a question not now before the court. The question here is not whether the State could tax the possibility of future acquisition,— the contingency that plaintiff might thereafter acquire title to these lands, — *i. e.*, impose a tax on plaintiff's expectations. The power of the State to do this might well be disputed; but that question is not raised by this case. The question here is, whether the State could tax the land *as* land. That is what has been attempted; and the attempt, if successful, will result in a sale of the land carrying the fee simple, thereby not only preventing possibility of future acquisition by plaintiff, but also depriving the United States of title which it had not voluntarily relinquished.

The case is entirely unlike the taxation of a mining claim. A mining claim is recognized by the United States laws as a legal right or interest, distinct from the ownership of the land in which the mine is located. Such a claim is property. (*Forbes* v. *Gracey*, 94 U. S. 762, pages 766, 767.) But no claim of that nature is alleged to be vested in these plaintiffs. The present tax was imposed on the theory that the entire interest in the land, the fee simple, had passed from the United States and had become the property of the plaintiff. The tax is assessed, presumably, upon the entire value of the fee.

The liability of this land to State taxation depends upon the relation which the United States bore to this land at the precise date of the assessment, in 1883. Taxation in 1883 cannot be justified by

showing that there was then a possibility that plaintiff might ultimately become the owner of the land. It must appear that plaintiff was *then*, to all substantial intents and purposes, the owner; that the United States government had *then* ceased to have or exercise any power or control over it.

So far as regards the question whether, under a just construction of the laws of the United States, these lands can be regarded as having ceased to be the property of the United States, it is entirely immaterial whether the laws of Wisconsin do or do not regard lands thus situated as having passed from the United States.

"We hold the true principle to be this, that, whenever the question in any court, State or Federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that, whenever, according to those laws, the title shall have passed, then that property, like all other property in the State, is subject to State legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States." — Mr. Justice BARBOUR, in *Wilcox* v. *Jackson*. 13 Peters, 498, 517.

"When the engagements or undertaking of the United States with respect to property exclusively and confessedly their own, from a period anterior to the existence of the territorial government, shall have been consummated; when the subject, and all control over it, shall have passed from the United States, and have become vested in a citizen or resident of the territory, then indeed the territorial regulations may operate upon it; but whilst these remain in the United States, or are affected by their rights, or powers, or duties, those rights, duties or powers can in no wise be influenced by an inferior and subordinate authority."— Mr. Justice DANIEL, in *Irvine* v. *Marshall*, 20 Howard, 558, 564.

"Whether the Supreme Court of Tennessee rightly construed the provisions of the constitution and statutes of the State, as not exempting from taxation land belonging to the United States, exclusive jurisdiction over which had not been ceded by the State, is quite immaterial, because, for the reasons and upon the authorities above stated, this court is of opinion that neither the people nor the Legislature of Tennessee had power, by constitution or statute, to tax the land in question, so long as the title remained in the United States." — Mr. Justice GRAY, in Van Brocklin *v.* Tennessee, 117 U. S. 151, 180.

If it were competent for a State Legislature to say that, notwithstanding contrary provisions of United States laws, the title shall be deemed to have passed out of the government,

"the effect of this would be, not that Congress had the power of disposing of the public lands, and prescribing the rules and regulations concerning that disposition, but that [Wisconsin] possessed it. That would be to make the laws of [Wisconsin] paramount to those of Congress, in relation to a subject confided by the Constitution to Congress only. — Mr. Justice BARBOUR, in Wilcox *v.* Jackson, 13 Peters, 498, 517.

IV.

The Intention of Congress.

Even if the probable intent of Congress is to be arrived at by looking solely at the bearing of any particular construction upon the interests of the United States, we think it will be found that the United States had retained a right, an interest, a power of restriction which would be completely annihilated by the proposed exercise of taxing power on the part of the State of Wisconsin.

Congress reserved to the United States the exclusive right of determining (through its executive department), the time when the conditions of the act should be deemed fulfilled, so as to pass the title and control from the government. Congress also reserved to the United States the correlative right to restrict the disposition of these lands by the railroad companies until after such determination by the executive.

It is obvious that both these reserved rights are subject to be impaired, not to say destroyed, by State taxation *ad interim*.

That such rights were reserved in this instance is clear, for more than one reason.

First. The Act of 1864 must be construed in the light of the general policy of national legislation as to public lands, and as presumably intended to accord with that policy. The general policy of national legislation on this subject is to leave to the executive department the exclusive determination of the question whether and when governmental control shall be relinquished.[1]

The judicial department of the Federal government cannot anticipate or hasten the action of the executive branch on this question, and, *a fortiori*, a State court cannot. The power of the courts, such as it is, begins after the power of the executive ends.[2] It is the general policy of national legislation to leave no room for conflict between the executive and judicial departments of the Federal government as to the *status* of any particular tract, so far at least as concerns the question whether such tract still remains government property or not. It was not intended to allow the judicial department of the government to embarrass the executive department by assuming an antagonistic jurisdiction. "The political power cannot be thus ousted of its jurisdiction and the judiciary set in its place." It is also a part of the same general policy to leave no

[1] See remarks of Mr. Justice Bradley in *United States* v. *Jones*, 131 U. S. 1, 15, 19, cited in plaintiff's brief, page 36, note 1.

[2] Plaintiff's first brief, pages 35, 36.

room for controversy between the Federal executive and the States on this question. But the general policy of legislation as to both these matters will be completely subverted if this assessment is held valid. Here is a State tax assessed on land which the Federal government had not parted with in the manner prescribed by Federal law, but on the contrary had refused to part with, persistently declining to recognize in any manner whatever the plaintiff's claim thereto. To permit this land to be disposed of to a purchaser at a tax sale would be sanctioning an invasion by the State of the exclusive province of the Federal executive.[1] The right of the Federal executive to determine when and how the title of the Federal government shall pass "cannot co-exist with a power in a State to interpose and to dictate to the United States to whom, and in what mode, at what time, and by what title, the public lands shall be conveyed."[2]

Second. There are special provisions of the Act of May 5, 1864, which unmistakably show that rights were reserved to the United States (both as to place lands and indemnity lands) which are totally inconsistent with State taxation before the United States has voluntarily relinquished its control.

Sect. 7 of the Act of 1864, unlike some other land grant acts, provides for parting with governmental right and title by the issuance of a patent, and by that method only. Sect. 8 enacts "that the said lands hereby granted shall, when patented as provided in Sect. 7 of this act, be subject to the disposal of the companies respectively entitled thereto, for the purposes aforesaid, and no other. . . ." Certainly the framers of that section understood that, until the lands were patented, they were not "subject to the disposal of the companies." This phraseology is entirely incompatible with the idea of an absolute present grant to the corporation that would entitle it to dispose of, encumber or squander the lands in advance of the issuance of a patent.

Were these lands intended by Congress to be at the disposal of the State by tax sale before they were at the disposal of the railroad companies? If so, the taxing power of the State can render nugatory the governmental intent that the lands should not be disposed of until after the issuance of a patent; *and can thus deprive the government of the intended security that the lands should be applied to the purposes of the grant*, a far more important matter to the government than the costs of survey referred to in the *Prescott* case and the *McShane* case.

We think it clear that the United States retained the power of restricting the railroad company from disposing of the land until after the issuance of a patent. This power in the United States to

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[1] Plaintiff's first brief, pages 50, 51.

[2] See Daniel, J., in Irvine *v.* Marshall, 20 How. 558, 562.
Barbour, J., in Wilcox *v.* Jackson, 13 Peters 498, 516, 517.

stay the disposition of the land is utterly inconsistent with the alleged State power to tax the land. The two powers cannot coexist.

Third. If we look to the indemnity lands alone, the case is, if possible, still stronger. By the Act of 1864 the approval of the Secretary of the Interior is, in legal effect, made a condition precedent to the acquisition of any right to indemnity lands as against the United States. The condition is not, as defendants seem to think, that the railroad company should use its best efforts to procure approval, but that approval should actually take place. Until approval by the Secretary, the indemnity lands unquestionably remain the property of the United States, and would be so regarded in a court of equity, even if the United States were subject to suit just as fully as a private individual.[1] To allow State taxation before the approval of the Secretary has been obtained, would result in nullifying the condition precedent which Congress expressly prescribed as to the vesting of title to indemnity lands.

If the assessment was valid and a sale under it should be regularly made, the sale would pass the entire interest of all parties in the land, and the land would thereafter be held by title paramount to that of the government. The tax in question was assessed, not upon the interest or claim of the plaintiffs, whatever that might be, but upon the lands themselves. If the lands are held subject to the taxing power of the State they may be offered for sale to satisfy the tax, and the purchaser at a sale held in strict pursuance of law will acquire a valid title to them free from all pre-existing claims or rights of the United States. "It is the land which is taxed, and the sale would convey the title or nothing."[2] So in *Northern Pacific Railroad Co.* v. *Traill Co.*, 115 U. S. 600, 610, it is said that, if the assessment is valid and the proceedings well conducted, "the sale confers a title paramount to all others," and thereby destroys any title or lien theretofore existing in the United States.

It is no answer to the foregoing argument to say that there was in this instance no good reason why the executive department should have refused to relinquish the title and control. The sufficiency or insufficiency of the reasons is a matter which the statute submits to the executive department, and not to the courts. The only material question, so far as concerns the *status* of these lands in 1883, as between the railroad company and the United States, is, How did the executive department decide? not, Did the executive department decide as this court would have decided in its place? Where the favorable decision of one of the parties, or of a third person, is made a condition precedent to the acquisition of a right, it is useless for the losing party to impugn the intrinsic correctness of the de-

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[1] Plaintiff's first brief, pages 22, 23, 34–38.

[2] See Mr. Justice Miller, in Colorado *v.* Commissioners, 95 U. S. 259, 265.

cision. Mistake is immaterial, unless it was of so gross a nature as necessarily to imply bad faith. If this were held otherwise, the result would follow that the selection of indemnity lands would not be "subject to the approval of the Secretary," as the statute prescribes, but subject to the approval of any court which might subsequently be called upon to pass collaterally on the question.

Whether the lands should, at any given time, be regarded as having passed from the United States so as to become taxable, depends upon the intention of Congress as manifested by the Act of May 5, 1864. In determining the probable intent of Congress, we are to look at the effect of any particular construction, not only in its bearing upon the interests of the United States, but also in its bearing upon the interests of the railroad company. Congress undoubtedly intended to confer a beneficial interest upon the railroad company. There is an *a priori* improbability that Congress could have intended to permit the burden of taxation to be imposed on these plaintiffs before they had the benefit of the substantial ownership of the lands. The plaintiffs, at the date of this assessment, had not title, were not in possession, and could not legally take possession.[1]

A great deal has been said in past years concerning the hardship resulting from the doctrine that the government cannot be sued. It has hitherto been reckoned a great hardship that persons dealing with the government can have no judicial remedy. But if the defendants are right in the present contention, it is plain that the unfortunate situation of claimants against the government has hitherto been very much underestimated. The half has not been told. Their misfortune has hitherto been supposed to consist solely in the fact that they could not obtain possession of property to which they believed themselves morally entitled. But the defendants now contend that, while the claimants are thus suffering deprivation, they must pay rental (in the shape of taxation) upon the property which they are deprived of. Taxation is really rental paid the State for the protection of one's property. Must plaintiff pay rental for land which it was not permitted to enjoy? Must it bear the double penalty of failing to get the land, and yet paying rental for it? Is it not enough for the plaintiff to be actually kept out of the land, with-

[1] Defendants cite Act of Congress, March 3, 1887, Chap. 376, § 6, as evidence of the intention of Congress that under railroad land grants " an interest passed to the company by the grant and by the withdrawal of the lands, and this without reference to the location of the lands as to their being in place or in the indemnity limits" so as to render them taxable. It is clear that the act affords no evidence of such intention. Many land grant acts provide, as does the Act of May 5, 1864, that if the railroad is not completed within the time limited, "no further sale shall be made, and the lands unsold shall revert to the United States." It was to protect purchasers at tax sale of lands belonging to the railroad company which might be forfeited for breach of a condition subsequent that this section of the act was passed; besides, we are not to look into a statute of 1887 for evidence of the intention of Congress in passing the Act of May 5, 1864.

out being treated as constructively in the ownership and possession for the purpose of bearing the burden?

We find no fault with the maxim, — *Qui sentit commodum sentire debet et onus.* But that maxim must be completely reversed to justify this taxation. To accomplish that purpose, it would have to read, He who does *not* receive the benefit, must bear the burden. If the tax is held legal, these plaintiffs must pay it, or lose all chance of thereafter acquiring the land. And the plaintiffs would then run the risk of losing what they thus pay out for taxes, if the land is ultimately held to be the property of another.

> See Mr. Chief Justice WAIT, in Litchfield *v.* County of Webster, 101 U. S. 773, 778.

EDWIN H. ABBOT,
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Attorneys for Plaintiff in Error.

JEREMIAH SMITH, *of Counsel.*

BOSTON, November, 1889.

FILED.
NOV 9 1889
JAMES. H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889, No. 76.

THE WISCONSIN CENTRAL RAILROAD COMPANY,

Plaintiff in Error,

against

PRICE COUNTY and the COUNTY CLERK and COUNTY TREASURER of PRICE COUNTY,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

By WILLIS HAND and M. BARRY,

Attorneys for Defendants in Error.

BEE PRINTING CO., PHILLIPS, WIS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888. NO. 343.

THE WISCONSIN CENTRAL RAILROAD COMPANY,
Plaintiff in Error,
AGAINST
PRICE COUNTY, ET AL.,
Defendants in Error.

Brief for Defendants in Error:
By WILLIS HAND and M. BARRY.

THE ISSUE.

The material issue before the court in this case is:

Were the lands described in the complaint of the plaintiff in error taxable in the year 1883?

On pages 26, *et seq*, of the *printed record*, we find the complaint in this action.

On page 27 it is alleged that on the 25th day of February, 1884, the plaintiff was, and ever since has been the owner in *fee simple* of the lands mentioned; and that in 1883 said lands were exempt from taxation for the reason that the title of some of them was in the United States, and the title of some of them in the State of Wisconsin.

On pages 14, *et seq.*, of the printed record we find the answer of defendants in error.

From this, as amended at the trial by permission of the court, as shown on page 205 of the printed record, it appears that the defendants in error admit and claim, that on February 25th, 1884, and for several years prior thereto, and prior to 1880, the plaintiff in error was the *equitable* owner of said lands, and that all of said lands are a portion of the lands earned by, and granted to, the plaintiff for the purpose of aiding in the construction of its railroad.

Then follow pages 15 and 16, allegations showing that under and by virtue of Chapter 80 of the Laws of Congress for the year 1864, and various acts of the legislature of the State of Wisconsin, which are fully and properly pleaded in the usual manner, the plaintiff was granted all the lands mentioned in the complaint for the purpose of aiding it to construct a railroad through and across Wisconsin, and especially that part of Wisconsin now embraced in Price county, where the said lands are situated; that all of these several granting acts were passed long prior to the year 1880; that prior to the year 1880 the plaintiff had completed as required by law, its road through the territory now embraced in Price county, and had fully earned all of its lands mentioned in the complaint, and had made and presented to the proper authorities at Washington, D. C., due and sufficient proofs of the completion of its road as required by said several granting acts; and that by virtue of the said several granting acts, and the proper completion of the plaintiff's road, and the due performance, on plaintiff's part, of all the acts and conditions required by said acts to be performed by the plaintiff in order to obtain a perfect title to said lands, the plaintiff had, prior to the year 1880, become the absolute *equitable* owner of all said lands.

Thus the answer of defendants presents the two questions:

1. What was the nature of plaintiff's title when the lands were assessed in the year 1883?

2. If plaintiff's title was only an equitable one at that time were the lands then taxable?

The answer also denies that the plaintiff had the legal title February 25th, 1884, or at any time?

STATEMENT.

The evidence in the case shows, briefly, the following facts:

1. By the third section of the act of congress of May 5th, 1864, entitled "An act granting lands to aid in the construction of certain railroad in the State of Wisconsin," a grant of lands was made to the State of Wisconsin, to aid in the construction of a railroad, commencing at one of four several points, to-wit: Portage City, Berlin, Doty's Island or Fond du Lac, and running thence to Superior on Lake Superior.

Such grant was of every alternate section of land for ten sections in width on each side of the road when located, and an indemnity of ten additional miles in width on each side of the road for lands which might be found to be disposed of at the date when the definite line of the road should be located. Such road was to be completed in ten years from the date of the act. By an amendatory act April 9th, 1874, the time for the completion of the road was extended to december 31st, 1876.

1 Land Laws of the United States, 277--292.

2. By several acts of the legislature of the state of Wisconsin the grant was accepted, and railroad companies duly chartered to build the roads, the plaintiff in error, in this action being the successor of all previously organized companies, and the owner of said grant and the railroads constructed from the year 1871 up to the present date. (Printed Record, p. 15.)

3. The line of definite location of the road was fixed and adopted in the year 1869, and the lands were withdrawn from market in December of that year by order of the commissioner of the general land office. (Record, 291–2, 203–5.)

4. The line of definite location of said road through the territory now embraced in Price county was along the range line between ranges one and two east; and through the town of Worcester in which are all the lands described in the complaint. The ten-mile limits of the grant were marked by two lines running parallel thereto one being ten miles east, and the other ten miles west thereof; and the twenty-mile limits were marked by two lines parallel to the line of definite location, one being twenty miles east, and the other twenty miles west thereof. (Record, 291–3.)

5. That all of the lands described in the complaint are situated in the indemnity limits and outside of the ten-mile, or granted, limits, except twelve descriptions.

6. That the lands described in the complaint are all situated contiguous and opposite to the 6th section of the Wisconsin Central railroad; that the 6th section was completed prior to Dec. 31st, 1876; that on November 15th, 1876, the governor of Wisconsin duly certified that said 6th section was duly completed as required by law; that the governor's said certificate of the completion of the 6th section was forwarded to Washington, and filed in the office of the secretary of the interior, Dec. 26th, 1876. (Record, 59–77, 295–6–7.)

7. That all of the lands described in the complaint, except thirteen descriptions, were selected by the plaintiff as belonging to its grant, in 1876, and its application for patents thereon were filed by the plaintiff in the local land offices at Wausau and Eau Claire, Wisconsin, in December, 1876, and such selections duly certified by the registers and receivers of those offices respectively. The lists and certificates from the Eau Claire office bear date Dec. 15th, 1876, and those from the Wausau office, Dec. 9th, 1876. They were forwarded from those offices to the general land office at Washington, and the copies introduced in evidence are certified by the commissioner.

The certificates of the registers and receivers show that the lands are land grant lands and free from adverse claims, and that all fees for selecting have been paid by the plaintiff company. (Record, 175–192.)

8. On January 9th, 1878, the government issed patents to the plaintiff in error on lands in townships 36, 37, 38, 39, ranges 1, 2 and 3, east, Wisconsin, which townships lie opposite to said 6th section of railroad. (Record, 192–200.)

9. The Wisconsin Central railroad runs through the town of Worcester, Price county, Wisconsin. (Record, 220.

10. All the lands described in the complaint were patented to the plaintiff on February 25th, 1884, by the governor of the state of Wisconsin. The state patent recites the act of congress referred to, the various legislative acts relating to the grant and then, by virtue thereof, quit-claims the lands to the plaintiff.

It also recites that the railroad has been completed by the plaintiff in error, as required by law and that due proof of such completion has been furnished by the plaintiff in error, and the plaintiff in error is entitled to the lands granted for the purpose of aiding in the

construction of said road, which are then described in said patent. (Record, 166–7.)

11. Up to the time of the trial of this action, no patents had been issued to any person, by the government of the United States for the lands described in the complaint. (It is now understood that patents have since been issued to the plaintiff in error for all of these lands, but of course this does not appear in the record. These patents are recorded in the records of the general land office in Vol. 9 of patents at pages 272 to 294, and 316 to 325.)

12. The plaintiff, through its vice-president and general solicitor, E. H. Abbot, Esq., made strenuous efforts for several years to induce the secretary of the interior to approve its lists of these lands for patent, but he refused to do so. (Record, 79, *et seq.*)

13. That the reason given by the secretary of the interior for refusing to approve the plaintiff in error's lists for patent, and the only reason was that the plaintiff had already received its full quota of lands under the grant; that because the plaintiff was not entitled to indemnity for lands disposed of by government, prior to the date of the grant, as well as after the date of the grant, and before the line of definite location was fixed and the lands withdrawn from market, no more patents could be issued to it; that plaintiff had already received over 40,000 acres of land more than it was entitled to receive. (Record, 80, 82, 83–4, 158–162.)

14. The number of acres of land in the odd-numbered sections, within the granted, or ten-mile limits, is 1,377,383.93; the number of acres disposed of by government, prior to the passage of the granting act is 789,622; the number of acres disposed of subsequent to said date, and prior to the withdrawal of the lands from market is 161,695.53. (Record, 159.)

The number of acres patented to the plaintiff in error in the indemnity limits up to December 26th, 1877, when the secretary of the Interior announced his ruling on the subject, was 203,495.62.

The secretary then ruled that the plaintiff in error had already received patents on 41,800.09 acres of land in the indemnity limits more than it was entitled to. There is no proof that any patents have since been issued by the government on indemnity lands, but the testimony of Mr. Abbot shows that the plaintiff had been unable to get any further patents thereon, up to the time of trial.

The secretary of the interior refused at that time to approve for patents the plaintiff in error's lists of lands in the indemnity limits amounting to 167,072.14 acres. The three lists in evidence in this case, upon which the plaintiff in error failed to get patents at that time, and all of which are included in the number of acres last above given, cover 40,519.31 acres.

15. In 1882 one Edward Rutledge, a lumberman, obtained an "option" on some of the railroad lands, or timber, in sections 19, 21, 23, 25, 29, 33, 35, T. 37, R. 2, west, and in Sec. 19, —37,— 1, west, and in the winter 1882–3 cut off a part of the timber. He explained his "option" as being an agreement between the plaintiff and himself, under which he paid the plaintiff the full value of the pine on the land, and took his chances of getting the title of the land, when the company should get its patents. (Record, 208–11.)

In October, 1882, A. B. M'Donald obtained a like "option" of the plaintiff on the timber in some of the odd-numbered sections in towns 38–9, range 2, west, and paid full price for the pine timber. (Record, 211–14.)

Mr. Abbot, in his testimony, testified that the only value of the land was in the timber. (Record, 89.)

16. In the year 1883 the lands described in the plantiff's complaint were assessed in the town of Worcester, Price county, and taxes for town, county and school purposes levied thereon.

17. Commencing on page 99 of the printed record and ending on page 157, are printed certain depositions, which are not properly a part of the record.

These depositions, with accompanying exhibits, were taken at the instance of the defendants in error, but afterwards they became immaterial, and they were, therefore, not introduced in evidence on the trial. They are not, therefore, properly before this court, nor a part of the record.

ARGUMENT.

I. Nature of the congressional and legislative grants, whether *in presenti* or otherwise; and herein of compliance with the terms of the grant and proofs thereof.

II. Selection of indemity lands, and approval of seselections.

III. Estoppel of plaintiff in error to claim that the indemnity lands were afloat until approval of selections.

IV. Relation of title; and herein of the effect of plaintiff's state patent; and concerning the United States patent issued to plaintiff since 1883.

V. Plaintiff's standing in court.

VI. Taxation of plaintiff's interest.

We will consider these questions in the order above set forth.

I.

Nature of the congressional and legislative grants, whether *in presenti* or otherwise; and herein of compliance with the terms of the grant and proofs thereof.

This question naturally falls into several sub-heads, which will be considered in order, viz:

1. What title passed by the grant to the state of Wisconsin? And what title was conveyed by the state grants to the plaintiff in error?

A. The act of congress was a grant *in presenti*, passing the equitable title to all the lands within the **granted limits,** immediately to the State of Wisconsin.

On the filing of the plaintiff's map in the general land office at Washington in 1869, showing the definite location of the line of the road, that title to the granted lands became vested in the state, as of the **date of the grant.**

The legal title remained in the United States, to be conveyed by patent to the beneficiary of the grant whenever the terms of the granting acts should be fully complied with by some company then to be created and chartered by the State of Wisconsin.

On the completion of the road by the plaintiff, in all respects in compliance with the several acts of congress and of the legislature of the State of Wisconsin, and the filing in the land office at Washington of the required proofs thereof, the full equitable title to the granted lands became irrevocably vested in the plaintiff, and

it only remained for the United States to convey to the plaintiff, by patent, the bare legal title.

These propositions we understand to be conceded by counsel for plaintiff in error.

The language of section 3 of the granting act shows this clearly.

I Land Laws of the United States, 278.

Upon this theory the grant was conferred upon the companies chartered by the Wisconsin legislature to build the road.

Chapters 314 and 362, P. & L. L. of Wis., 1866.

The courts have uniformly so held.

Rutherford vs Greene's Heirs, 2 Wheat., 196.
Railroad Co. vs Baldwin, 103 U. S., 426.
Swan and Billings vs Lindsay, 70 Al, 517.
Wood vs Railroad Co., 104 U. S, 329.
Tarboreck vs The B. & M. Ry Co., 2 McCrary, 407.
Grinnel vs Railway Co., 103 U. S., 738.

In the last case above cited, the court suggests a *quere* as to the *status* of the lands in the indemity limits and as to whether a present interest in them also, passed by the granting act.

In the following cases this court also holds the grant to be *in presenti* as to lands in the granted limits:

Kas. Pac. R'y Co. vs Atch. Top. & S. Fe. R'y Co., 112 U. S. 414. (Book 28, L. Ed., 794.)
St. P. & Sioux C. R'y Co. vs Winona & S. P. R'y Co., 112 U. S., 720. (Book 28 L. Ed., 872.)
Sioux C & St. P. R'y Co. vs Chi. M. & S. P. R'y Co., 117 U. S., 406. (Book 29, L. Ed., 928.)

The last three cases cited above also relate to the *status* of the **indemnity** lands, and will be referred to again.

B. As to the **indemnity lands:**

We contend that **a present interest** was conveyed by the grant in and to the indemnity lands.

The interest so conveyed attached at the date of filing in the proper office of a map of the definite line of location of the road and acquired precision on the happening of either of two events, viz:

1. The selection of the lands, or

2. The determination, by the proper officers, of the fact that all of the government lands within the indemnity limits, at the date of the withdrawal of the grant from market, would be required to satisfy losses in the granted limits.

(a) And here at the threshhold of this enquiry, let us say that in order to correctly determine the *status* of the indemnity lands **for the purpose of this case** we must consider the **relations** of the **parties** herein to those lands.

From the beginning the plaintiff in error has asserted its right to patents from the United States on all of the lands in question in this action.

This right has been not only asserted but strenuously urged by plaintiff ever since the completion of its road at the close of the year 1876. At that time due proofs were made by plaintiff of the completion of its road; *and the lands were selected.*

This right was never disputed by defendants in error.

On the contrary, defendants as strenuously assert that the plaintiff was entitled to patents in January, 1877.

Plaintiff, during all this time, based its claim to patents on the fact that it possessed the equitable title.

Defendants make the same assertion.

This is not a case in which two parties assert title adverse to each other.

In every case which has been before this court wherein the *status* of the indemnity lands has come in question there have been rival claimants for the lands.

This fact distinguishes all those cases from the one at bar.

In those cases it was a question of **superior** title, which party to the controversy had the better right.

Here, **both parties** to the suit assert that plaintiff was vested with the equitable title.

True the plaintiff does not put it in this language, but in asserting the right to patents the plaintiff necessarily claimed to be already vested with the equitable title.

In the consideration of this question it may be interesting to read the deposition of E. H. Abbot, vice-president and general solicitor of the plaintiff company, together with his "argument" which is a part thereof, found printed in the Record, on pages 77 to 92.

From the date of the completion of plaintiff's road in 1877 to the date of its patent from the State of Wisconsin, Feb. 25th, 1884, the plaintiff asserted the right to patents on the lands in question. Such right necessarily rested upon the fact that the equitable title had already become vested.

Defendants made precisely the same claim, and rest their right to an affirmance of the judgment herein upon such claim.

The **real question** is: What was the *status* of the indemnity lands from the date of the filing of a map of the definite location of the plaintiff's line until after the year 1883, as between

The **plaintiff** and the **United States**.

(b) For the present we desire to discuss this question without reference to the *selection* or non-selection of the lands.

We will first consider where the several granting acts, together with the building of the road by the plaintiff, and due proofs thereof properly filed, placed the equitable title, and what rights the United States and the plaintiff possessed, with respect to such lands.

We very properly assume that the plaintiff here will raise no question in regard to the proofs furnished by it of the completion of its road.

While those proofs may be subject to certain technical objections, yet those objections have never been raised by the governor of the State of Wisconsin nor by the secretary of the Interior, and it would not "look well," to say the least, for the plaintiff to raise them in this action.

The several granting acts, congressional and legislative, conveyed to plaintiff a present interest in the indemnity lands.

Else why withdraw them from market? Who was interested in having them withdrawn from public sale?

Not the public, not the United States, surely, but the plaintiff.

The grant says these indemnity lands "shall be held by said state or by the company to which it may transfer the same." The same words of grant, viz: "That there be and is hereby granted," etc., apply to *all* the lands which should finally go to the company.

Congress says: We hereby give ten sections on each side and within ten miles of a line to be located, but if it shall appear that we do not own ten odd-numbered sections in *that locality*, then we hereby give enough in *another locality* designated to make up the ten sections. The first shall be **known** by the *location of the road*; the second by *selection of the lands*.

It is conceded that as to lands within the granted limits an interest passed by virtue of the act; that such interest acquired precision at the date of filing a map of definite location, and took effect as of the date of the grant, **cutting off intervening claimants.**

This court has so decided.

Railway Co. vs Baldwin, 103 U. S., 426.

In this case there was a grant of a right-of-way 200 feet wide, in 1866. In October, 1869, Baldwin settled on the land in controversy; in October, 1871, the definite line of the road was located, when it was found that the right-of-way fell on the land Baldwin had settled on. The court held that the railroad company had the superior right.

By precisely the same reasoning an interest passed at the date of the grant, in the lands to be determined by selection.

The act simply points out two modes of *ascertaining* the lands given, one by a location of the road, and the other by actual selection of the lands.

This is the only difference in the terms of the grant relating to the two classes of lands granted.

Furthermore it was a grant of quantity, viz: Ten sections to the mile on each side of the road, with a single limition, i. e. ten sections, if, on the location of the road it should be found that the government owned so much within both the granted and the indemnity limits, jointly.

The intention was to give twenty sections to the mile.

Congress guessed a strip twenty miles wide would accomplish its purpose; but, fearing the government had sold some in that strip, widened the strip to forty miles.

The location of the line determined the sections from which the lands must be taken, *in both limits.* Those sections were immediately withdrawn from market. Then, the indemnity lands must be selected from the odd-numbered sections, nearest to those sections in the granted limits wherein lands had been sold.

Here we have a definite rule for the selection of the indemnity lands. Therefore the work of selection was merely ministerial. A clerk could easily and properly attend to it. No particular judgment had to be exercised. The rule laid down by the granting act is iron bound. There is no chance for the exercise of discretion. The terms of the grant take away discretion, leaving only clerical work to be done.

Of far less importance is this clerical work, governed by strict rule, than the survey of the Michaeltorrena grant to Alvarado, in the case in 17 How., 542. There the surveyor was able to find the lands intended by the grant, by following the directions given in the act itself. Therefore the lands granted were determined by the act.

So here, the grant, applied to the lands by the aid of the records in the several land offices, was and is definite and certain as to all the lands.

Otherwise we shall have to say that it was a grant of lands *in presenti* as to the lands in place, and *in futuro* as to the indemnity lands.

How can it have this double character?

The indemnity lands were withdrawn from market in 1869. And for the plaintiff in error. This of itself gave the plaintiff an interest in them. No one else could claim them. If by chance a stranger had filed a homestead claim on a single forty in the indemnity limits, after 1869, he would have had to yield it up to the plaintiff in error, when claimed by it. *Baldwin vs Railway Co., supra, 16 Op., Attys Gen., p 878.*

The plaintiff could enforce its claim to the lands in a suit against the United States.

Act of Congress of Mch. 3d, 1887, cited in Southern Pa. R'y Co. vs U. S., decided Mch. 14th, 1889, D. California.

In this case it appeared that the proper officers refused to issue patents to the plaintiff for certain land grant lands which plaintiff had fully earned. The right to bring the suit was sustained by the court.

This court has repeatedly affirmed the doctrine that after the United States have parted with the title to lands the courts will determine who has the true title and to this end will **correct errors of law** in the rulings of the land department, and overrule decisions in that department obtained by fraud or made by reason of gross mistakes of fact.

Marquez vs Frisbie, 11 Otto, 473.
Johnson vs Towsley, 13 Otto, 72.
Shepley vs Cowan, 91 U. S., 330.
Moon vs Robbins, 96 U. S., 530-5.
Gaines vs Thompson, 7 Wall., 347.
Litchfield vs Register, 9 Id., 575.

Applying the doctrine of these cases, and the practice sustained in *South. Pac. R'y Co. vs U. S., supra*, and the

way was clear for the plaintiff to enforce a transfer of the title to it from the United States, to all of the lands in question in this case, if refusal to patent had been persisted in, by the land department officials.

In such a suit, by the plaintiff against the United States, to recover the lands, **no available defense existed.**

The **capricious refusal to approve** the selections, based on an error of **law** would not have stood in the way for a moment.

The enquiry would be: Has the plaintiff **earned** the **lands** and **performed** all the **conditions** required of it? An affirmative answer to this question would give the plaintiff judgment for the lands absolutely, without reference to **any other question.**

The secretary of the Interior has authority to withdraw lands from market, when granted to aid inbuilding a railroad

Wallcot vs Des Moines Co., 5 Wall., 861.
Williams vs Baker, 17 Id., 144.

While withdrawn, no settler can acquire a valid right to such lands in either limit, as against the railroad company.

16 Op. Att'ys Gen., 87-8.

Congress has twice recognized the superior right of the railroad companies to all of the withdrawn lands. (21 St. L. 315. Supp. Rev. St. 1881, p. 587.)

This Statue provides that when a settlement is made thereon, *with the consent of the railroad company*, the settler shall have the first right to purchase the lands of the government after restoration of the same to market.

In 18 St. L., 194, (Supp. Rev. St. 1881, p. 86), railroad companies are given the right to select other lands in

lieu of lands belonging to their grants, which may have been homesteaded or pre-empted "subsequent to the time at which, by the decision of the land office, the right of said road was declared to have attached." Such settlers may then perfect their claims and obtain patents.

This act was clearly intended for the relief of the settler.

And again, **congress** has **recognized** the exact principle we are contending for, viz: That an interest passed to the company by the grant and by the withdrawal of the lands, and this without reference to the location of the lands as to their being in place or in the indemnity limits.

Sec. 6 of Ch. 376 of 2d session of 49th Congress, (Mch. 3d, 1887.) relating to the adjustment of land grants in general to railroad companies, reads as follows:

"That where any such lands [meaning land grant lands] have been sold and conveyed, as the property of any railroad company, for the state and county taxes thereon, and the grant to such company has been thereafter forfeited, the purchaser thereof shall have the prior right, which shall continue for one year from the approval of this act, and no longer to purchase such lands from the United States, at the government price, and patents for such lands shall thereupon issue; *provided* that said lands were not previous to or at the time of the taking effect of such grant, in the possession of or subject to the claim of any actual settler."

This is a recognition by Congress of a **right** of **property** in the roilroad company, in and to the

lands covered by the grant, and **before payment** of the least **consideration therefor.**

And this recognition applies to lands **which have not been earned.** The statute relates to lands to which the railroad company has merely an **inchoate** right; the mere, naked right to earn them under its contract with the government.

And yet congress deems it **wise and just** to recognize a sale of that inchoate interest for taxes. Wise and just because government is thus permitted to collect its needed revenue, and he who payes that revenue is not deprived of the consideration which induced him to pay it.

How **infinitely stronger** is the case at bar where the plaintiff had paid the **full consideration** for the lands before they were taxed. Here the plaintiff and not the government possessed the beneficial interest, because plaintiff had fully paid for the lands.

Such, then, was the situation of the granted and indemnity lands.

Now consider briefly the relation of the plaintiff to the lands and to the United States with reference to the lands belonging to the grant.

In 1869 the line of the road to be constructed was laid in the field; a map thereof was made showing the definite location of the line, and such location was formally adopted by the plaintiff. Said map was filed in the general land office and approved, whereupon all

of the land grant lands were withdrawn from market by direction of the secretary of the Interior.

This withdrawal was for the exclusive benefit of the plaintiff.

Prior to this withdrawal the plaintiff had accepted the grant and engaged to build the road.

A contract existed between the United States and the State Wisconsin as parties of the first part and the plaintiff as party of the second part.

Gray vs Davis, 1 Woods, 420.

In that contract the parties of the first part agreed to give plaintiff good title to certain lands on certain conditions. The second party, the plaintiff, accepted the conditions and agreed to earn the lands by performing those conditions.

On the completion of the contract both parties to it were bound. The United States and the State had parted with their control over the lands belonging to the grant, save and except the right to enter and declare a forfeiture in case of the failure of the plaintiff to perform the conditions. No title to the lands could be conveyed to other parties. The United States were bound to hold the lands for the plaintiff. *Hence the withdrawal.* The United States were compelled to withdraw them in order to fulfill its contract. All of the lands within the limits of the grant, owned by the United States at the date of filing the map of definite location were thus placed in the absolute control of the plaintiff, save and except only, that plaintiff could not dispose of them.

But till what time were the lands tied up by this limitation! Till the completion of the road and performance by plaintiff of the required condition? Or till the issue of patents?

The Land Department has recognized the right of plaintiff to dispose of the indemnity lands, *prior* to patent.

6 L. D. 190.

The plaintiff *exercised* the right to dispose of the lands in 1882–3, long prior to the issue of patents. (Record 208—12.)

If plaintiff possessed the right to dispose of the lands, or the timber on them in 1882, it likewise possessed it in 1877, as soon as the road was completed

On the completion of the road in 1877 and performance of all of the conditions imposed upon plaintiff, the **condition subsequent** was **fully performed.**

The plaintiff's title could not then be defeated. The government could not then take the lands from plaintiff.

The courts would enforce plaintiff's right to the land.

And this without reference to the question of selection, for the **plaintiff was not charged with** the **duty** making the selection.

Section 3 of the granting act, 1 Land Laws, 278.

This absolute right in the plaintiff to the lands as **against** the **government** was and is **property.**

Because the plaintiff had no further duties to perform the equitable title was fully vested.

Carroll vs Safford, 3 How., 441. (Bk. 11, L. Ed., 671.)
Kas. Pac. R'y Co vs Prescott, 16 Wall., 603. (Bk. 21, L. Ed., 373.)
U. P. R'y Co. vs McShane, 22 Wall., 444 (Bk. 22, L. Ed., 747.)

In view, then, of the relations of the parties interested to one another and to the land grant lands, including the indemnity lands, we contend that *without selection*, the plaintiff, prior to 1883, became vested with an indefeasable interest in the indemnity lands.

As bearing on the question and sustaining the rule by analogy, at least for which we contend we cite the following cases:

Lessieur vs Price, 12 How., 59.

On the 6th day of March, 1820, congress passed an act for the admission of Missouri into the Union, and among other regulations to aid the new state, enacted, "that four entire sections of land be, and the same are hereby granted, to said state for the purpose of fixing the seat of government thereon, which said sections shall, under the direction of the legislature of said state, be located as near as may be in one body, at any time, in such townships and ranges as the legislture aforesaid may select, on any of the public lands of the United States."

In *Lessieur vs Price*, the court, speaking of this grant, says :

"It was a present grant, wanting identity to make it perfect; and the legislature was vested with full power to select and locate the land; and we need only here say, what was substantially said by this court in the case of *Rutherford vs Greene*, that the act of 1820 vested a title in the State of Missouri of four sections and that the selection made by the State Legislature, pursuant to the act of Congress, and the notice given of such location to the surveyor general and the register of the local district where the land lay, gave precision to the title, and attached it to the land selected. The United States assented to this mode of proceeding; nor can an individual call it in question."

In *Schulenberg vs Harriman, 88 U.S., 551*, this court quotes the foregoing language from *Lessieur vs. Price* and then adds:

"Numerous other decisions might be cited to the same purport. They establish the conclusion that, unless there are other clauses in a statute restraining the operation of words of the present grant, these must be taken in their natural sense, to import an immediate transfer of title, although subsequent proceedings may be required to give precision to that title and attach it to the specific tracts. No individual can call in question the validity of the proceedings by which precision is thus given to the title where the United States is satisfied with them."

The case of *Rutherford vs Greene, 2 Wheat., 196*, is a strong one on this point.

In that case the court construed an "Act of North Carolina, passed in 1782, which provided that twenty-five thousand acres of land should be allotted and given to General Greene and his heirs within the limits of a tract reserved for the use of the army, to be laid off by commissioners appointed for that purpose."

After the survey was made and returned General Greene's title was questioned. The court held that "the general gift of twenty-five thousand acres lying in the territory reserved became by the survey, a particular gift of the quantity contained in the survey, and * * * that the act of 1872, vested a title in General Greene of the twenty-five thousand acres to be laid off within the bounds designated, and that the survey made in pursuance of the act gave precision to that title and attached it to the land surveyed."

The above quotation is from the opinion of this court in the case of *Schulenberg vs Harriman.*

In the case of *Winona & St. Peters R. R. Co. vs Barney, 113 U. S., 618*, this court, in construing a grant, had under consideration the indemnity lands. The court, in its opinion, uses the following language:

"Nor is it to any purpose to cite decisions to the effect that the grant is *in presenti*, passing an immedate interest to the state. Such is undoubtedly the case, except as the operation of the grant is affected by the limitations mentioned; that is to say, when the sections granted are ascertained, the title to them takes effect as of the date of the grant, and cuts off all intervening claimants except as to such portions as may have been sold, or to which pre-emption rights have attached."

If this means anything it clearly means that the whole grant is *in presenti*, and that as soon as the definite line of the road is fixed, the specific sections are determined, and the grant attaches at once to the particular lands granted, *in the indemnity limits*, as well as in the granted limits.

Nor do we consider that what this court has said in the following cases as in conflict with our position, because the relations of the parties to the land in those cases were entirely different, viz:

St. Paul & S. C. R'y Co. vs Winona & S. P. R. Co., 112 U. S., 720. (Bk. 28, L. Ed., 872.)

Sioux C. & St. P. R'y Co. vs Chicago, M. & St. P. R'y Co., 117 U. S., 404. (*Bk. 29, L. Ed.*, 928.)

As between two railroad companies whose rights to the grant were initiated by the same act of congress, as in these two cases, perhaps it was equitable to hold that title to the indemnity lands passed to neither until the lands were settled; for each had an equal right to earn and select those lands.

And perhaps it was equitable to hold, as this court held in the case in 117 U. S., 404, that, as between the two claimants, priority of selection gave priority of right.

But in the case at bar there are no conflicting claimants and no such question arises.

Furthermore, in the administration of railroad grants, the right of the railroad companies to control the indemnity lands to the exclusion of other parties, has uniformly been recognized and enforced by the land department.

After the withdrawal of such lands from market, third parties have always been denied the right to acquire an interest in them. The railroad companies have first been allowed to exhaust their claims, and if any lands then remained, they were *restored to the public domain.*

Railroad Co. vs Fisher, 1 L. D., 392.

"Whensoever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and no subsequent law, or procla-

mation or sale would be construed to embrace it or operate on it."

Wilcox vs Jackson 13 Pet., 498.

Land grant lands, upon withdrawal, are held for the railroad company and cease to be public lands and an entry, even on the **lieu** lands is incapable of perfection until the grant is fully adjusted, and not then if required by the railroad company.

Overholt vs D. M. Wagner, 1 L. D., 389.

This is the correct rule except as modified by statutes already cited, enacted for the benefit of the settler. No hardship to the settler would operate to change the rule stated in *Oveholt vs Wagner.*

N. P. R'y Co. vs Pressey, 2 L D., 551.
Wolsey vs Chapman, 11 Otto, 755. (Bk. 25 L. Ed., 915.)

In the case of Taylor vs R'y Co. 2 L.D., 557, the rule was applied to a preemption claim within the indemnity limits of a railroad grant.

Carrahan vs R. R. Co., 2 L. D. ,483.

An honorable member of this court, while secretary of the Interior recognized and applied the rule. 6 L.D. 77. (May 20, 1887)

And at the same time it was found necessary to bring the railroad companies into court, virtually, to defend their rights; hence an order to show cause was served on them before a final order revoking former withdrawals was made. Also

Van Wyck vs Knevals, 106 U. S., 360. (Bk 27 L. Ed., 201.)
Walden vs Knevals, 114 *U. S , 373. (B'k 29 L. Ed., 167.)*

Such withdrawal severs the lands from the public domain.

Kas. P. R'y Co. vs Atch. T. & S. F. R'y Co., 13 *Fed.,* 106.

In the light of these rulings and decisions it seems impossible to escape the conclusion that even before selection the plaintiff was vested with an equitable interest in the lands.

It is true that circumstances *might* have occurred which would have prevented this inchoate equitable interest from ever becoming perfect, but those *circumstances never did occur.*

We can easily conjecture difficulties; we can fancy certain conditions unfulfilled; we can suppose a case where the government would still have an interest, a beneficial interest, in the lands, operating to suspend the equitable title and to wholly defeat it; but in the case at bar these would all end in conjecture, fancy and supposition. In 1883 the government absolutely had no beneficial interest whatever in the lands.

C. Before proceeding to a discussion of the question of the selection of the indemnity lands we will consider the condition of the grant in 1883, when the taxes were levied of which plaintiff complains.

The proof shows that at that time plaintiff was entitled to *all* of the government land within the indemnity limits.

From Commissioner J. A. Williamson's letter to Secretary Schurz, found on pages 159–60 of the Record, the following facts appear; and they are uncontradicted, viz:

Total No. of acres, within the granted limits, in odd-numbered sections,		1,377,383.93
No. of acres disposed of prior to passage of granting act,	789,622	
No. of acres disposed of after date of granting act and before withdrawal,	161,659.53	
Total,		951,281.53
No. of acres remaining for plaintiff in granted limit,		426,101.60

The number of acres disposed of prior to date of withdrawal, viz: 951,281.53, represents the exact number of acres plaintiff was entitled to within the indemnity limits.

This is more than twice the number of acres obtained by plaintiff in the granted limits. So if plaintiff obtains no more acres from the indemnity than from the granted limits it will be short 525,179.93 acres of the quantity of land intended to be given it.

Again, inasmuch as the indemnity limits are the same width as the granted limits, viz: Twenty miles, it is fair to assume that they contain the same number of acres as the granted limits, viz: 1,377,383.93, and no more, in the odd-numbered sections. So the plantiff is left to indemnify itself for 951,281.53 acres, lost in the granted limits out of 1,377,383.93 acres, in the indemnity limits.

But over two-thirds of the granted lands are lost to plaintiff by prior entries and sales; hence we may conclude that one-half, at least, of the indemnity lands are like-wise lost by prior entries and sales.

If so it is impossible for the plaintiff to obtain full indemnity even by taking all of the unsold lands within the indemnity limits.

These figures do not amount to a demonstration, but we submit that it is fair to infer that plaintiff is entitled to all of the unentered lands in the odd-numbered sections within the indemnity limits.

If so **what need** is there of **selection?**

In such case **selection** of the lands and **approval** of the selections would be merely **perfunctory.**

Being so, the failure to select, or the **failure to approve** selections made could not operate to suspend, nor with-hold, the equitable title.

II.

Selection and approval of selections:

A. While we have contended so far that an equitable title vested in plaintiff to the indemnity lands, *without* selection, or approval of selections, yet the main point in our argument, and the one upon which the case turned in the Supreme Court of Wisconsin, is that the selections made, of indemnity lands, including the lands in question in this case, were, in fact, or in *law*, approved by the secretary of the Interior.

See Opinion of Supreme Court, Record, 289.

(a) **Approval by implication.**

The only reason given by the secretary of the Interior for refusing to approve the plaintiff's lists for patent was that as plaintiff was not entitled to indemnity for lands in place disposed of prior to the date of the grant, its quota was full.

This objection has been overruled by this court.

Winona & St. P. R'y Co. vs Barney, et al., 113 U. S., 618. (B'k 28 L. Ed., 1109.)

No objection was made to the particular discriptions selected.

Hence he **waived all objections** to the **selections.**

This amounted to an **approval** by **implication** of the particular tracts selected.

This court has held that the receipt of the map of definite location of a railroad in the Land department with-out objection must be "considered as equivalent to its acceptance."

Walden vs Knevals, 144 U.S., 373. (Bk 29. L. Ed., 167.)

The rule is well nigh universal that one having the right to object, who fails to exersise that right at the proper time, is held to have waived his right to object, and is thereby precluded from afterwards exercising it.

And the rule is equally universal, that when one, having the right to object, specifies a single objection, and stands on that alone, he is held to have waived all other objections which he might have interposed at the time.

Numberless decisions might be cited to sustain these proposition but it seems hardly necessary to cite them to this court.

(b) The only question now is : Do these principles apply to the case at bar ?

When the secretary of the Interior refused to approve the plaintiff's lists for patent upon the grounds stated, did he waive all other grounds of objecton ?

To settle this question let us enquire into his duties in the premises.

(1) The **selection** had already been **approved** by the **land department.** The plaintiff's lists had been filed in the local land offices; the Registers and Receivers had made a critical examination of the records in those offices and thereupon had attached their certificates to the lists certifying "that the filing of said list is allowed and approved, and the whole of said lands are surveyed public lands of the United States and within the limits of twenty miles on each side and that the same are not, nor any part thereof, returned and denominated as mineral lands, nor claimed as swamp lands, nor is there any homestead, pre-emption, state, or other valid claim to any portion of said lands on file or record in this office." (Record pp. 191-2.)

This constituted an approval of the **selections** by the land department.

It was in accordance with the usual method employed for approval of selections.

Ryan vs Railway Co. 9 Otto., 382.

And was contemplated by the only statute on the subject.

Sub-division 7., Sec. 2238, R. S., 1878.

(This prescribes fees for Registers and Receivers for location of land grant lands.)

These certificates were made by the officers having the custody of the **original record** of the entries and other filings and claims against the public lands.

Hence these officers were the only ones competent to make such certificates. They, alone, could make such certificates from the original records.

Hence, the act of congress must have contemplated the making of these certificates by those officers; and it must have been intended that this should constitute the required *approval* of the selections, so far as each particular tract was concerned.

This examination of the original records, and certification of the lists by the Registers and Receivers, were in law the act of the Secretary of the Interior. He works by many hands. He cannot possibly act *in person* in every case; he must act through subordinates.

These officers are virtually, in law, his clerks.

Their act in this case was his act. And he **recognized** and **approved their work** when he failed to object to the particular selections.

When plaintiff took its lists to Washington, so certified and presented them to the Secretary of the Interior and asked him to approve them for patent he virtually replied: Your selections are all right; you have selected public lands from the odd-numbered sections

within the twenty mile, or indemnity limits; these lands are not denominated mineral lands, nor claimed as swamp lands, nor is there any homestead, preemption, state, or other valid claim to any portion of them, but you cannot have them **because your quota is full.**

You are not entitled to indemnity for lands lost in place prior to the date of grant and therefore you can have no more.

And the act of Congress intended that the Land Department should act in just this manner.

The language used in Section 3 is: "That it shall be lawful for any agent or agents of said State * * * to select * * * as **much** public land," etc.

The important thing to be *approved* by the Secretary of the Interior was the **quantity** selected.

As we have seen the evidence before him was conclusive that the lists filed embraced only lands covered by the grant, and intended for the plaintiff, *provided* the plaintiff was entitled to *so much*.

It was for the Secretary to say stop,—enough.

Nothing else was left for him to do.

He said this but he was in error, on a question of law.

In view of these two facts it can not now be held that the indemnity lands were a "float" and not "seggregated" from the public domain in 1883 so as to prevent the equitable title from vesting in the plaintiff, viz:

(a) There were 951,281.53 acres lost to plaintiff in the granted limits to be made up out of a possible 1,377,383.93 acres in the indemnity limits, at least half of which must have been entered and sold prior to 1869, at the date of the withdrawal.

(b) The lands had been selected in 1876–7 by the

plaintiff and the selections approved by the Registers and Receivers of the local offices.

(2) Suppose that when the Secretary of the Interior, at the time he refused to approve plaintiffs lists for patent upon the grounds which he assigned, had made an order restoring the indemnity lands to public sale and entry.

Suppose again, that immediately thereafter, and as a consequence, such restored lands had been immediately sold to and entered by various individuals, and patents issued therefor.

Then, upon the decision of the Secretary of the Interior being overturned by the courts, there would have arisen a contest between the plaintiff and the various patentees. Thus the question of the effect of the Secretary's erroneous refusal to approve the lists for patent would have been squarely presented in a contest, not like the present one, but between persons asserting adverse title.

Such a contest would necessarily have been caused solely by the erroneous decision of the Secretary of the Interior.

In such suppoed case whose title would have prevailed in the courts?

Certainly if the Secretary of the Interior had brought about such a state of things by the decision of a question entrusted to his *discretion,* such decision would have been final.

But if he erred, as he did, in the legal construction of the grant who could be bound by it?

In such supposed case who would have suffered by the action of the Secretary of the Interior? The plain-

tiff, of course, for it would have been driven into court to obtain its rights.

Hence the waiver of objections to the selections would have amounted to an estoppel.

Who would have suffered in the case at bar if such erroneous decision of the Secretary of the Interior had been accepted as final?

Clearly the plaintiff, and all claimants in privity therewith.

Among those claimants, is the defendant Price County, which would suffer the loss of so much revenue, and be deprived of the privilege of levying a tax on so much land. Price County being composed of citizens, individuals, tax payers, the loss would fall on many, who would have to bear an unjust share of the tax levied to administer municipal affairs.

And all on account of the failure of the Secretary of the Interior to object to specific selections of lands made by the plaintiff.

Had an objection to the particular discriptions been made by him at the proper time doubtless proper steps would have been taken by the plaintiff to make unobjectionable selections. The lists, no doubt, would have been revised, and erroneous selections stricken out.

But in view of the objection which *was* made the plaintiff did not find it necessary to do anything, except urge that the Secretary had erred upon a law question.

Furthermore if the Secretary of the Interior had **expressly refused to approve** of the *particular selections* contained in the plaintiffs lists, **he could not thereby** have deprived the plaintiff of the lands.

Such disapproval would have been an **abuse** of **discretion.**

The lists were correct and contained the discriptions of the **plaintiff's** lands.

The **proof** on this question is **conclusive.** The

certificates of the Registers and Receivers, **being uncontradicted** are conclusive.

Therefore there is **no proof** to sustain an express **disapproval** of the selections.

Therefore such adisapproval would have been an abuse of discretion on the part of the Secretary of the Interior, and would not have been sustained in the courts.

(3) Why, then, does not the doctrine of *waiver*, and approval by implication, or acquiescence apply to the ruling of the Secretary of the Interior in this case?

What is there peculiar about the case to except it from the general rule? We contend there is nothing.

As tending to sustain our position we cite the following authorities on the question of waiver.

"Waiver is an intentional relinquishment of a known right."

2 Herm. on Est., Sec. 825.

Waiver is voluntary and implies an election to dispense with something of value, or forego some advantage which the party waiving it might, at his option, have demanded or insisted upon.

Waiver may take place by the use of language, or by silence; by conduct or by failure to act. Id.

When a party has an opportunity to object and fails to do so, he waives the objection, If he raises some objections and neglects to raise others which he has a right to raise he may not be heard to raise them afterwards.

2 Id., Sec's. 827, 831.

"Where a party, with full knowledge of all the facts creating the liability, acquiesces in what has been done, he thereby ratifies what is done, and silence in such case, after a reasonable time, will amount to a ratification."

2 Id., Sec. 768 and cases cited.

A party waived objections to the report of a board of survey, appointed as arbitrators, when he failed to make them before the witnesses were scattered.

U. S. vs Shrewsbury, 23 Wall., 508.

An insurance company may waive any condition in a policy inserted therein for its benefit.

Ins. Co. vs Norton, 96 U. S., 234.

Also may waive proofs of loss.

Home Ins. Co. vs Bolt Warehouse Co., 93 U. S., 527.

A **State** may waive its immunity from suit by appearing in court.

Clark vs Barnard, 108 U. S, 436. (27 L. Ed., 780.)

"The government has the right and power, as against itself, to waive any irregularities, however palpable, which may appear in the acts of its own agents, but it cannot impair any vested rights which others have acquired.

Bernard vs Ashley, 18 How. (U. S), 43.

Many more authorities might be cited, but it seems unnecessary.

(4) **Estoppel:** Why does not the law of estoppel also apply to the ruling of the secretary of the Interior, considering all of the circumstances of the case?

In view of all that has occurred since the filing of plaintiff's selections and the present relation of the defendant to the land, it would be inequitable to permit the secretary of the Interior to now say that he did not approve of the particular descriptions selected; this is said, of course, on the supposition, indulged for the moment, for the purpose of the argument, that approval of the selections was necessary in order to permit plaintiff's equitable title to vest.

Therefore we respectfully call attention to some settled principles and authorities seeming to have proper application to the action of the secretary of the Interior.

"It is not necessary, in order to the existence of an equitable estoppel, that there should exist a design to deceive or defraud. The person against whom the estoppel is asserted must, by his silence or his representations, have created a belief of the existence of a state of facts which it would be unconscionable to deny, but it is not essential that he should have been guilty of positive fraud in his previous conduct; nor is it essential that there should, in all cases, be an intention to deceive, or even a knowledge that the representation was false. It would be trifling with a doctrine depending on equity and good conscience, to hold otherwise."

2 Herm. on Est., Sec. 772, and cases cited.

The **ground** for applying the law of **estoppel** to the action of the **secretary of the Interior** in the case at bar is simply this: That his **action** in reference to approval, and his **silence** as to particular descriptions, led plaintiff and defendants, or contributed to lead to them, into their present situation with refer- to the lands, and therefore rendered the **selections,** made by plaintiff, **effectual** as **segregating** the lands from the public domain.

If a controversy had arisen over the particular descriptions claimed by plaintiff; if some other individual had claimed them; if the government had claimed that some prior or adverse right had become attached to them; if in short, they had been in conflict, in any manner, then plaintiff's claim that they had not been **segregated,** would have some weight.

But notice that plaintiff makes this claim *for the secretary of the Interior.*

The latter has never claimed that they were not segregated.

To the plaintiff's claim that they were not, in 1883, we reply that the secretary of the Interior is estopped to deny that the selections were effectual to accomplish a segregation of lands; and plaintiff is likewise estopped from asserting it for him.

The latter point we shall consider further on.

The doctrine of estopped applies to government and public officers.

A county may be estopped from assessing lands for taxation.

County of Calhoun vs Am. Ex. Co., 3 Otto, 124.

A state may be estopped either by its action, or failure to act.

State vs Milk, 11 Fed. R., 389.
Cahn vs Barnes, 5 Id., 326.
Com. vs Andre, 3 Pick., 224.
Com. vs Pejepscut, 10 Mass., 155.
People vs Soc. for Prop. of Gosp. 2 Paine, 545.
State vs Bailey, 19 Ind., 452.
People vs Maynard, 15 Mich., 463.

The United States may be estopped, as where she adopted the acts of a collector she cannot be permitted to say he was not a legally authorized collector.

The U. S. vs Collier, 3 Blatch. 325.

A state having selected lands as indemnity lands under a railroad grant was held estopped to claim them under an earlier swamp land act.

Hough vs Buchanan, 27 *Fed. Rep.,* 328.

"Where there is *power* and it irregularly exercised, or there are defects and omissions in exercising the authority conferred by law, the doctrine of estoppel may well be applied."

2 Herm on Est., Sec. 1222, 1229.
Kneeland vs Gilman, 24 Wis., 39.

The foregoing rule was applied to the acts of officers of municipal corporations.

This doctrine has been applied to municipal corporations by this court.

Knox County vs Aspinwall, 21 How., 538.

III.

Estoppel of plaintiff in error to claim that the indemnity lands were a **float** until approval of selections.

The plaintiff selected the lands in question immediately after the completion of its road in 1876.

This selection by the plaintiff was an assertion of claim of title. It constituted a declaration that these lands were now segregated from the public domain, and had beome the property of the plaintiff.

This selections was **public** and the record of it became a public record.

This record would govern the action of the **taxing officers** of the defendant, Price County, in determining what lands to **levy taxes** on, within their jurisdiction.

Those officers would have a right to assume the correctness of the plaintiff's claim to the lands, **so far as plaintiff is concerned.**

The action of the plaintiff caused the taxing officers to levy taxes on the lands.

This closes the plaintiff's month to say that the taxing officers acted improperly. The plaintiff is estopped

to deny the correctness of this action of the taxing officers.

If the United States have any substantial claim against the lands, the taxes cannot stand. But no such claim, nor any claim whatever, is asserted and none exists.

So far as **plaintiff** is concerned the lands were identified when selected, and the certificates of the Registers and Receivers attached to the lists. These acts segregated them from the public domain. They were then definitely known; the title then attached if it had not attached before. The specific lands were known not only to plaintiff but to taxing offiers. They were then known in the local land offices as the plaintiff's lands.

Therefore by reason of the conduct of the plaintiff in selecting the lands, thereby making a public record of its claim to them, and the necessarily consequent action of the taxing officers in levying a tax upon them, we contend that plaintiff is estopped from now saying that the lands were afloat until the selections were expressly approved by the secretary of the Interior.

Our position on this question has received strong recognition in the case of *Puget Sound Ag. Co. vs Pierce County, 1 Wash. Ter., 159.*

In that case plaintiff claimed about 160,000 acres of land near the British boundary, prior to the treaty of June 15th 1846, by which the exact boundary was fixed, and as the lands were then found to be in Washington Territory the treaty recognized the rights of the plaintiff in the lands and stipulated that his claim should be confirmed. No particular tracts were mentioned as plaintiff had no paper title whatever.

The plaintiff had the land surveyed and platted, after which taxes were levied on them in Pierce county, the assessors adopting the plaintiff's survey.

Afterwards the government surveyed the adjoining

lands, recognizing the survey made by the plaintiff. A large portion of the lands, at the time of taxation, were also claimed adversely to plaintiff. by individuals who settled on them under the donation act.

Held, 1. "That by treaty the plaintiff had an interest in the lands.

2. That although the legal fee was still in the United States, in *equity* the plaintiff was the owner.

3. That not only the legal fee but the equitable interest may be taxed.

4. That, although the treaty does not define the boundaries of the land, yet because the plaintiff admits *that the lines taken by the assessors are the true lines*, and that if liable at all to pay taxes they are liable to pay on *those lands*, no question of bounderies or segregation from the public domain is involved in the case: that the plaintiff is *estopped*, by its own acts and admissions, from denying the lines taken by the assessors."

In the case of *C. B. & Q R'y Co. vs Holdsworth, 47 Ia., 20*, the plaintiff brought an action to recover possession of a forty acres of land, held by defendant under a tax deed. The land belonged to the grant of May 15th, 1856, and was sold in 1868 for taxes of 1865 and 1867. The lists were **not approved** by the secretary of the Interior till May 10th, 1869.

Lands held taxable, and held that the claim of plaintiff that it had completed the road and earned the lands when the taxes were levied was an *admission* of these facts.

So we contend that here the plaintiff has conclusively admitted that these lands were segregated from the public domain in 1876, as soon as selected.

We note the following authorities on this branch of the subject, announcing general principles of the law of estoppel and sustaining our position that the plaintiff may not now claim that the lands were not segregated from the public domain by its selection of them.

"All that is meant in the expression that an estoppel must possess an element of fraud is that the case must be one in which the circumstances and conduct would render it a fraud for the party to deny what he had previously induced or suffered another to believe and take action upon; the door is shut against asserting a right then that would result in doing an injury by the party asserting it to some other person, or when in good conscience and honest dealing he ought not be permitted to ganisay his previous conduct.

This is sufficient to work an estoppel and bring in the element of moral wrong, and there need be no precedent, corrupt motive or evil design.

If the effort to deny ought not, in good conscience to be successful, then emerges the moral wrong which the counts determine fraud."

2 Herm. on Est, Section 775 and cases cited.

In the case at bar plaintiff selected the lands.

The secretary of the Interior, who had the right to object to the particular selections, and to the plaintiff's making the selections instead of the state, was silent on these points.

Now plaintiff asserts that his failure to expressly approve left the lands a part of the public domain.

We assert that plaintiff's selection of them severed them from the public domain.

Plaintiff denies this.

We contend that plaintiff is estopped to deny the result of its own acts.

And especially when those acts led us to tax the lands selected.

Plaintiff's selections in 1876, became a public record.

Defendants had a right to rely on that record.

Defendants did rely on it, and taxed the lands in consequence.

How perfectly, then, does the principal above cited apply.

Where a party makes an incorrect return of his

property liable to taxation he is estopped to deny its correctness."

2 Herm. on Est., Sec. 575 and cases cited.

"The doctrine of equitable estoppel is founded upon the principle that a party has, by his own voluntary act, placed himself in such a situation in regard to some fact that he is precluded from denying it."

2 Id., Sec. 786, and cases cited.

2. **Sale** of **timber** by plaintiff.

The sale of timber from a portion of the lands to the witnesses Rutledge and Mc Donell constitutes another ground of estoppel.

In view of these transactions how can plaintiff be heard to say they did not know which lands were theirs and could not, therefore, pay taxes on them?

After selection and before approval of the selections plaintiff sells the pine timber on these lands; the purchasers immediately cut and remove the timber, the only value the land possessed, as Mr. Abbot, the plaintiff's vice-president and general solicitor testified.

This makes rather a **hard showing** in a **court** of **equity.** While pleading that they "did not know which lands to pay taxes on" they pocket the cash for timber on said lands, permitting the timber to be cut and removed, leaving the lands stripped and worthless, while the government may go to ruin for the want of revenue.

The principles and authorities already cite are sufficient on this point.

3. Receiving the **state patent** of February 25th, 1884, was an admission *of record,* on the part of plaintiff, that the equitable title had previously vested..

This admission also constitutes an *estoppel,* and taken in connection with the evidence, estops plaintiff from

denying that the equitable title became vested at the time of selection in 1876.

The patent was issued upon the theory that the equitable title had already vested.

It recites all of the antecedent steps taken by government, the state and the plaintiff, in relation to these lands. The performance of the acts therein recited vested an equitable title in the plaintiff. Standing alone those recitals do not show *when* the acts were performed. That lack the defendants supplied. Our proofs show beyond question when the conditions were performed which vested the equitable title in plaintiff, which the patent now steps in to confirm. It assumes the existence of an equitable interest, already vested in plaintiff. The plaintiff already had the beneficial interest, and we proved *when* it vested. We do not *contradict* the patent; we supplement its recitals by showing the facts more in detail.

Plaintiff asserts that its patent is *prima facie* evidence that the *legal* title vested in plaintiff at the date thereof. This we do not here controvert; section 4153, R. S. of Wis., for the year 1878, sustains this position. But under that section the presumption as to the time when the equitable title vested would seem to fix it only just prior to the date of the patent, as it might be assumed that the patent was issued as soon as the conditions were performed which entitled plaintiff to it. But we prove *when* the equitable title vested, upon which the patent is based.

The case of *Eaton vs North, 20 Wis., 449,* is directly in point on this question. There the plaintiff claimed the land under a tax deed for the taxes of 1841. The defendant claimed under a patent dated June 9th, 1842. The patent conveyed lands belonging to the Brothertown Reservation, set apart under an act of congress of the year 1839. The patent recited the fact that the

commissioners appointed to allot the lands had made an allotment of these lands to Fowler (grantee in the patent), but neither the date of the commissioners' report, nor the date when the report was filed appears from the patent. The act of congress required the report to be made on or before Jan. 1st, 1840.

But the court holds this requirement only directory and that the report might have been made afterwards. No proof was offered as to when the report was made nor filed.

The court says: "The tax deed was *prima facie* evidence that the land was liable to taxation. The patent, we hold, rebutted that evidence. It then devolved upon the plaintiff to show *when* Fowler first acquired a taxable interest in the land. He failed to prove that Fowler, before the patent issued, had such interest, or, if the delivery of the report to the president would have given him such interest, *when* it was delivered."

Inasmuch as plaintiff knew that all the conditions had been performed and *when* they were performed, the taking of its state patent was an admission, by plaintiff, that all the steps leading up to it had been taken, and that the equitable title had become vested.

This necessarily involved the admission that the lands had become segregated, ascertained, identified.

This admission constitutes an estoppel; plaintiff may not now assert to the contrary.

And this **patent** must have been **issued** upon the **selections made by the plaintiff,** in evidence in this case. There is no proof of any other selections having been made by anybody.

4. As related to the question of estoppel, we call attention to the following proposition laid down by this court in *Schulenberg vs Harrimann, supra,* as applying to this case, viz: "No individual can call in question the validity of the proceedings by which precision is thus given to the title, where the United States are satisfied with them."

The proofs of the case at bar show that no one but the **plaintiff** has questioned the proceedings taken prior to 1883 to give precision to the plaintiff's title to these indemnity lands.

The United States have never raised the question.

The secretary of the Interior was silent as to the methods employed to ascertain the lands.

Then why should not the above rule be applied herein, and close the plaintiff's mouth.

The fact is that 203,495.62 acres of land had been patented to the plaintiff, in the **indemnity limits,** and upon **selections** *made by the* **plaintiff.**

And two patents are in evidence in this case of lands in place, opposite to the 6th section of plaintiff's road, issued to plaintiff. (Record pp. 192, *et seq.*)

Hence it is a verity in the case, that the 6th section of plaintiffs road was completed according to law and due proofs thereof filed and that no objections have been made by the government to the fact that selections were made by the plaintiff instead of by the state.

IV.

Relation of title; and herein of the effect of plaintiff's **state patent** and concerning the **United States patent,** issued to plaintiff since 1883.

1. The plaintiff has had the audacity to come into

court relying on a patent to the lands in question, is sued toit by the state of Wisconsin. The complaint and plaintiff's proofs disclose the fact that plaintiff dared to rest its standing in court on this patent.

This being the case, plaintiff is in no position to deny that the principle of **relation of title** applies.

Therefore we assert the following proposition:

The grant of lands; their withdrawal; their selection; the approval of the lists, or acquiescence in the selections made; the issuance of the patent, were successive steps in a single conveyance and the title related back to the date of the first step, viz: the date of the grant.

U. S. vs Arredondo, et al., 6 Peters, 691.
Barney et al. vs Winona & S.P.Ry. Co, 113 U.S.,618.
Railway Co. vs Baldwin, 103 U.S, 426.
Mo. K. & T. Ry. Co. vs Kan. P. Ry. Co., 97 Id., 491.
Schulenberg vs Harriman, 21 Wall., 44.
Wood vs Railway Co., 104 U. S., 329.
Tarboreck vs B. & M.Ry. Co. in Neb., 2 McCrary, 407.
Wheeler vs Merriman, 30 Minn., 372.
3 Wash. on Real Prop., 180, (3d Ed.) and cases cited note 4.
Grinnel vs Ry. Co., 107 U. S., 739.
Gibson vs Chaoteau, 13 Wall., 92.
Landes vs Brant, 10 How., 348.
5 Cruise on Real Prop., 510-11.

In *Gibson vs Chaoteau* the rule is laid down "that the doctrine of relation is a fiction of the law, adopted by the courts solely for the purpose of justice, and is only applied for the security of persons who stand in privity with the party that instituted proceedings for the land and acquired the equitable claim or right to the title."

And here the case of *Heath vs Ross, 12 Johns. 140,* is cited.

This rule fits our case exactly, as we claim under the plaintiff.

We claim to have levied a tax on the plaintiff's interest in the lands. If the title of the plaintiff to the land stands our claim for taxes stands; if its claim falls our claim falls with it.

Only one of the cases cited applies to the doctrine of relation to a tax levy, viz: *Wheeler vs Merriman.*

In that case, one White, in 1857, purchased the land in controversy of the government with a military bounty land warrant, which afterwards turned out to be spurious. In November, 1864 his entry thereunder was canceled, and sixteen years afterwards, in 1880, White availed himself of the privilege allowed him, and entered the land with $100 cash, and obtained a patent. During all this time the only interest White had in the land was the right allowed him, the first and exclusive right, indeed to enter the land for $100 cash.

From 1857 up to the time he obtained his patent, the lands were sold for taxes and defendant held title under such sales. The plaintiff, Whites grantee, brought ejectment and was defeated, the court holding that when White obtained a patent, his title related back to the date of entry in1857, and rendered the defendant's tax title good.

This fits our case. We claim that plaintiff's equitable title has been properly taxed. On plaintiff's own theory, and vigorously asserted claim, its claim to the lands, existing and asserted prior to the date of its state patent, was made complete by virtue of that patent. If made thus complete by virtue of the patent, such patent clearly confirms the validity of the taxation in 1883.

The foregoing cases clearly establish our proposition that the doctrine of relation applies to the case at bar.

It is clear that the plaintiff could invoke this principle to protect the lands in question from any and every adadverse claim whatsoever originating not in privity with

the plaintiff, on the theory that the title of plaintiff under its state patent is good, and of course plaintiff so asserts, any claimant under patent from the government, based upon an entry made subsequent to withdrawal of lands could be summarily ejected at the suit of the plaintiff, and any one trespassing during that period could be made to respond in damage to the plaintiff except as protected by the statute we have cited. On the other hand a mortgage of the plaintiff's interest in the lands would be good as against the plaintiff. On a foreclosure and sale the purchaser would take the plaintiff's inchoate title, and then, whenever patents should issue to the plaintiff it would hold the legal title in trust for the purchaser at the foreclosure sale. And such purchaser could compel a conveyance of such legal title.

This interest in the land, before patent, is property.

Soulard, et al., vs U. S., 4 Pet., 511.

The court says: "The term 'property' as applied to lands, comprehends every species of title, inchoate or complete."

2. Since the hearing and decision of the case at bar, in the supreme court of Wisconsin, plaintiff's lists have been approved for patent, and patents have been issued thereon.

These facts are *de hors* the record, but it can do no harm to call the attention of the court to them.

For partial proof of this see 6 Land Dec. p. 190, where the secretary of the Interior directs the lists to be sent him for approval.

Doubtless this court takes judicial notice of the rulings of the secretary of the Interior, relating to the public lands. These volumes of Law Decision, cited in the brief are published officially by the land department. Perhaps this court will take judicial notice of

the record of patents in the general land office, where plaintiff's patents are recorded.

It being true that plaintiff has obtained patents from the United States on the lands in question, the fact may as well be met first as last.

This court may hold that the state patent to plaintiff conveys no title.

In our opinion this is the case.

If so the doctrine of relation could then not be applied to the case, so far as the state patent is concened.

But should the case turn on this point that the doctrine of relation has no application to the case for the reason that the plaintiff's state patent conveys no title, and the judgement reversed and the case sent back for a new trial, defendants could file a suplemental answer, setting up the issuance of a patent by the United States, and on a retrial prove this fact. Thus the principle of relation of title would have a valid patent to stand upon and if our position is correct that this case is a proper one in which to invoke the principle, the case would finally be decided upon this question of relation of title, and in our favor.

So in case we are not to prevail on any other point urged by us, and we are correct on this question of relation of title, we trust that the fact that plaintiff has a government patent to the lands may be considered by this court in finally deciding the case.

V.

Plaintiff's standing in court.

Before proceeding to discuss the question of taxation, we will, briefly, call the attention of this court to the precarious position of the plaintiff in this suit.

One of these two propositions is sound, viz:

1. The lands in question were **taxable** in 1883, or,

2. The plaintiff, at the time of the commencement of this suit, was a **stranger** to the lands and **must go out of court** with costs.

Plaintiff came into court resting on its patent from the State of Wisconsin, claiming the legal title to the lands.

That patent was *prima facie* evidence of title, and nothing more.

(a) The proofs introduced by us overcame the *prima facie* case made by the patent and showed conclusively the state of the title.

We introduced the congressional acts of the state of Wisconsin, which show conclusively that all of the interest granted to the state by congress, in the land grant lands, was transferred by the state to the plaintiff company, *by act of the legislature*, leaving nothing to be transferred by patent.

In Section 8 of Chapter 314 of the P. and L. L. of the State of Wisconsin, for the year 1866, occurs the following language:

"The company hereby created shall be entitled to and vested with the title to one equal undivided half of the lands pertaining to that portion of the road of said company which shall be so located and constructed from the said Stevens Point to Superior, and all and singular the rights, privileges and immunities granted or conferred, or intended to be granted or conferred, by section three of the act of congress entitled 'An act granting lands to aid in the construction of certain railroads in the state of Wisconsin,' approved May 5th, 1864. Said company shall be subject to all of the restrictions, impositions, duties and obligations contained in said act of congress, so far as the same are applicable to the company hereby created: Provided, that the title to the lands in this section mentioned and contemplated, shall not vest in said company sooner or faster than the lands

might be sold, as provided and declared in the aforesaid act of congress; and the said lands are hereby granted in consideration of the company so hereby created, complying with the terms of the grant hereby made, and of the aforesaid act of congress."

Section 9 of Chapter 362 of the P. and L. L. of the State of Wisconsin for the year 1866 contains similar language, conveying an undivided half of the grant to the company organized by that act.

Together, the two acts mentioned, organize and charter two companies one of them known as the Winnebago and Lake Superior Railroad Company and the other as the Portage and Lake Superior Railroad Company, and to each such company conveyed an undivided half of the land grant lands.

The plaintiff in error is the lawful successor of these companies.

The grant to plaintiff made by the Wisconsin legislature, and the compliance, by the plaintiff, with all of the conditions imposed by the congressional and legislative grants operated to transfer to plaintiff all of the interest which the state ever had in the lands, and left nothing whatever to be conveyed by patent.

(b.) The act of congress, granting the lands to the state expressly retained the legal title, and provided that it should be conveyed by patent direct to the beneficiary of the grant.

And upon that plan the whole grant has been administered by the land department.

Plaintiff adopted and followed the theory in applying for and receiving its patents from the United States.

Let us note briefly the inconsistency of plaintiff in obtaining its state patent.

1. For years it had been in a fierce struggle with the secretary of the Interior to obtain patents.

2. In this suit it asserts that in 1883 the lands were

a part of the public domain so as to exempt them from taxation.

3. Yet in 1884, when **precisely** the **same state** of **facts** existed as in 1883 when the lands were taxed, the *governor* of Wisconsin issues a patent and lo! the lands are at once "segregated" from the public domain!

In 1883 they are public lands because the secretary of the Interior refuses to approve plaintiff's lists for patent; in 1884 the governer of Wisconsin gives plaintiff a good title to them!

And no new facts have occurred to change the *status* of the lands.

Today the United States owns them; tomorrow the state of Wisconsin conveys good titles to them! What inconsistency!

And since the date of the state patent plaintiff has obtained a patent from the United States.

Now we **care not** for the **state patent.** If it stands we invoke the **doctrine** of **relation** and maintain that the title obtained thereby related back to December 1876 (if no farther) and confirmed the title obtained, initated, at the time of the completion of plaintiff's road and the selection of these lands.

If that patent is worthless, conveys no title, **on the facts proven** in this case, then **plaintiff** is **out of court** unless it falls back on our position:

That in 1883 the plaintiff was possessed of the full equitable, beneficial title, the United States simply holding the legal title in trust for it.

This being conceded the plaintiff has a standing in court to contest the taxes.

Otherwise plaintiff must go out of court and pay costs to defendants.

And there is nothing in the case of *N. Pac. Ry. Co. vs Rochne, 115. U.S., 600. (Bk 29, L. Ed., 477)* in conflict with our position. In that case no such question was raised, nor decided. There this court very properly held the lands not taxable because the fees for surveying had not been paid. The *United States* still had an interest in the lands, which could not be taken away by a sale of the lands for taxes.

Taxation of plaintiff's interest.

When once conceded or determined that in 1883 the equitable interest in the lands in question had become vested in the plaintiff, leaving only the legal title in the government, the conclusion inevitably follows that the lands were taxable that year.

In reality the enquiry as to the *status* of the title in 1883 is the **only question** before this court. **Not** the **Federal law** but the law of Wisconsin settles the question of the **taxability** of the lands when once the true state of the title is determined.

We will, however call attention briefly to the following propositions and authorities:

The **lands were taxable** as soon as the **equitable title became vested** in the plaintiff.

1. The taxing power of a state is one of its atributes of sovereignty.

Mathan vs Louisiana, 8 How., 73.
Wis Cent. Ry. Co. vs Taylor Co., 8 N. W. Rep., (Wis.) 646.

2. The power to tax extends to all persons alike, belonging to to the body politic and has its foudation in the nature of society itself.

Providence Bank vs Bellings, 4 Pet., 514.
Charles River Bridge vs Warren Bridge, 11 Pet., 420.
Carroll vs Perry, 4 Mc Lean., 25.

3. It is the policy of the law to require all property, not the property of government, to share equally in burdens of government.

Cooley on Taxation 6-7 et seq.
Sections 1034-5, Rev. St. of Wis., year 1878.

Section 1034 reads as follows:

"Taxes shall be levied upon all property in this state, except such as is exempted therefrom."

Section 1035 reads:

"The terms 'real property', 'real estate' and 'land', when used in this title, shall include not only the land itself, but all the buildings, fixtures, improvements, **rights and privileges** appertaining thereto."

We desire to call special attention to the words "rights and privileges" contained in the above statute.

These words are very sweeping.

It is difficult to conceive of any human relationship to property, in the nature of ownership, not covered by these two words. They certainly extend to an **inchoate interest,** or bare **right to acquire a title.**

In short these two words comprehend exactly the **relationship** of the **plaintiff to the lands** in question in the year 1883 when the taxes complained of were levied on them.

4. **Every species of title to and interest in, property, whether inchoate or complete, when vested in an individual, is taxable, unless expressly exempted.**

Forbes vs Gracy, 94 U. S., 762.
Astrom vs Hammond, 3 McLean, 107.
Carroll vs Perry, 4 Id., 25.
Union Pac. Ry. Co. vs Mc Shane, 22 Wall., 444.
Witherspoon, et al., vs Duncan, et al., 4 Id., 210.
Carroll vs Safford, 3 How., 441.
McGoon vs Scales, 9 Wall., 23.
Levi vs Thompson, et al., 4 How., 19.
Hodgdon vs Burleigh, 4 Fed. Rep., 111-118.
1 Desty on Taxation. pages 340–42, 318.

Whitney vs Gundersen, 31 Wis., 359–378.
Stockdale vs Webster Co., 12 Id., 536.
Stryker vs Polk Co. and Tifflin, 22 Ia., 131.
Litchfield vs Hamilton Co., et al., 40 Ia., 66.
The Ia. Homestead Co. vs Webster Co., 21 Ia., 221.
Hale & Norcross Gold and Silver Mining Co. vs Storey County, 1 Neb., 104.
The People vs Taylor, 1 Id., 109.
State vs Real Del Monte G. & S. M. Co., 1 Id., 523.
State of Cal. vs Moore, 12 Cal., 56.
People vs Shearer, 30 Cal., 645.
The People vs Frisbie, 31 Cal., 146.
People vs Black Dia. Coal M. Co., 37 Cal., 54.
Puget Sound Ag. Co. vs Pierce County, 1 Wash. Ter., 159.
Bellinger vs White, Treas., etc., 5 Neb., 399.
The Ia. R'y Co. vs Fitchpatrick, 52 Ia., 244.
Wheeler vs Merriam, 30 Minn., 372.
Mo. Riv., Ft. S. & G. R'y Co. vs Morris, 13 Kas., 302.
Prescott vs Beebe, 17 Kas., 320.
Ross vs Outagamie Co., 12 Wis., 29.
Cooley on Taxation, (2d Ed.,) 88 and note 1.

In five of the foregoing cases, viz: *Forbes vs Gracy*, and those in *1 Neb.* and *12 Cal.*, the taxability of "mining claims" while the legal title was in the United States, was involved, and the mere possessory right was held taxable, as *property*.

In *Stockdale vs Webster Co.* lands in the granted limits of a railroad grant were held taxable before selection or patent the road being completed. The Iowa statute was like that of Wisconsin and made taxable all "rights to land, tenements and hereditaments, equitable as well as legal."

In *Stryker vs Polk Co. and Litchfield vs Hamilton County, et al., (Iowa cases.)* a grant to improve the Des Moines river was considered. In 1858 the state conveyed the grant by legislative action to the Improvement company. In 1859 the Supreme Court of the United States adjudged the title to be in the govern-

ment. In 1861–2 Congress confirmed the title in the Company and its grantees. In October 1859 plaintiff bought the lands of the Company and the lands were taxed the same year.

Certified lists of the lands were not made by the governor and **approved** by the secretary of the Interior, as required by the act until June 1866.

The taxation in 1859 was sustained.

In *Bellinger vs White (Neb.)* a tax on a government homestead after five years occupation and before final proof was sustained.

Wheeler vs Merriam (Minn.) is a strong case of the taxation of an inchoate interest in mere claim to land.

In *Witherspoon vs Duncan* a tax levied on lands while a donation entry thereon was suspended, was sustained, on the ground that the equitable title had become vested.

In *Railway Co. vs Prescott, 16 Wall., 603,* this court used the following language:

"While we recognize the doctrine heretofore laid down by the court, that lands sold by the United States may be taxed before they have parted with the legal title by issuing a patent, it is to be understood as applicable to cases where the right to a patent is complete, and the equitable title is fully vested in the party, without anything more to be paid, or any act to be done going to the foundation of this right."

In *Union Pac. Ry. Co. vs Mc Shane,* this doctrine was again recognized; but in each case the lands were not taxable because the costs of surveying had not been paid.

In *McGoon vs Scales,* this court held that the equitable interest in the land of a *cestui que trust,* in Wisconsin, might be sold on execution, and that usually the legal title passed by such sale.

Carrol vs Safford was a case of the purchase of land

from government and taxation thereof before patent; the lands being held taxable.

The action of *Ross vs Outagamie County,* (Wis.) was brought to set aside a tax certificate issued for the taxes of 1855 on a quarter section of land.

The lands belonged to the grant to Wisconsin for the improvement of the Fox and Wisconsin rivers.

The lands were required to be selected, and the selections approved by the President. In 1843 the land in question was selected but the selection **was never approved.** June 9th, 1858, Congress confirmed the rights of settlers on the lands, claiming under the Improvement company.

Lands were held taxable in 1855.

The rule established by the authorities cited is that where the purchaser, entryman, or claimant under a grant, of government lands has **fully paid for the lands** in cash or has **performed all of the conditions** required to be performed in order to **fully earn the lands** and become entitled to a patent, so that the **government holds** only the **bare legal title,** the lands are taxable.

This rule fits the case at bar perfectly.

In 1883 there was absolutely **nothing more for the plaintiff to do** in order to be entitled to a patent of the lands in question. The road was then completed; due proofs of its completion made and filed, **and accepted;** the lands duly selected and selected lists presented to the secretary of the Interior for his approval; the fees for selecting were paid by the plaintiff.

There remained two things for the government to do, viz:

1. Approve plaintiff's lists.
2. Issue patents to plaintiff.

Nothing else remained to be done by either party.

The fact that there remained some **act to be performed** by the **government** could not affect the plaintiff's interest in the lands.

The **material fact** is that the **plaintiff** had nothing further to do. The plaintiff had made a valuable investment in the lands; had paid full value for them.

The action or non-action of the government officials could not divest plaintiff of this valuable interest in the lands. **This interest was property and as such was taxable in 1883.**

In case of a tax deed being issued on the lands for such taxes, the grantee would have acquired the legal title under the Wisconsin statute. Section 1176, R. S. of Wisconsin for year 1878, in stating the effect of a tax deed provides that it "Shall vested in the grantee an absolute estate is fee simple in such land."

So that, on the final issuance of a patent to the plaintiff on the lands thus sold and deeded for taxes nothing would remain to be done to make the title of the tax deed grantee perfect.

In closing let us note this fact:

The United States have absolutely no interest in this controversy.

Such was not the case, however, in former cases before this court in which it was held that lands were not taxable before patent.

In every one of those cases the government still had a **substantial beneficial interest** in the lands

taxed and the taxation was **defeated solely on that ground.**

Note also this point:

Plaintiff's argument that the lands were **not segregated** from the public domain is a **petty subterfuge.**

Every act was done that could be done to segregate the lands from the public domain.

The following is a recapitulation of the propositions for which we contend:

1. The act of Congress was a grant *in presenti* passing at least the equitable title to the lands in the granted limits to the state of Wisconsin.

2. The title thus conferred upon the state was transferred to plaintiff by legislative action.

3. A present interest was likewise passed to the state by the grant in and to the indemnity lands.

4. This interest was thereupon transferred to the plaintiff by the state by legislative action.

(a) This interest in the indemnity lands was inchoate and imperfect at the time of filing the plaintiff's map of the definite line of its road.

(b) Such interest attached to the lands and became a perfect equitable interest by and as a consequence of the completion of the road by plaintiff and full performance of all the conditions of the grant, and acquired precision on the happening of either one of two events, viz:

(1) The selection of the lands, or

(2) The determination by the proper officers that **all the indemnity lands** would be required to satisfy losses in the granted limits.

(c) The inchoate interest became ripe and a full equitable interest in 1876–7, and was then property.

5. This is not a case in which two parties assert adverse title to the lands. The inquiry is:

What was the *status* of the indemnity lands in 1883 as between the plaintiff and the United States.

6. A contract existed between the government and the plaintiff in regard to the lands in question. This contract was fully performed on plaintiff's part prior to 1883, by which performance plaintiff had fully paid for the lands in question.

7. The secretary of the Interior based his refusal to approve plaintiff's lists for patent upon an error of law.

8. Such refusal could not and did not prevent the equitable title from becoming vested in plaintiff.

9. Such refusal, resting upon the objection he made and specifying no other, was an approval by implication of the particular selections made, so as to segregate the lands from the public domain. This was a waiver of other objections.

10. The approval of the lists by the local land office officials was sufficient approval of the selections, and none other was necessary. Such approval segregated the lands from the public domain.

11. The plaintiff is estopped from asserting that the lands were not segregated from the public domain.

12. Inasmuch as **all** of the indemnity lands were required to make up losses in the granted limits no selection of the lands, nor approval of selections, was necessary in order to segregate them from the public domain.

13. On the issuance of plaintiff's state patent the title, initiated in 1869 by the filing of the plaintiff's map of the definite line of the road, related back to that date and validated the taxes levied in 1883.

14. Plaintiff received no title whatever by its state patent.

15. If plaintiff received no title by its state patent, and was not vested with the equitable title in 1883, it was a stranger to the lands at the time of the comencement of this action and must now go out of court with costs.

16. If plaintiff, since the trial of this action, has obtained a government patent, the doctrine of relation of title may still be applied to validate the taxes of 1883.

17. The interest plaintiff had in the lands in 1883 was a vested interest; was property which the courts would protect.

18. This interest was taxable, under the statutes of Wisconsin.

All of which is respectfully submitted.

WILLIS HAND and M. BARRY,
Attorneys for Defendants.

J. C. L'Hoover
Of Counsel

No. 76.

Wisconsin Central Railroad Company vs. Price County et al.

To the Honorable Supreme Court of the United States:

In making this application for leave to be heard in oral argument at this time we appeal to your discretion.

Aware of the confusion that would follow the frequent granting of an application like ours, yet we feel that inasmuch as important principles of taxation are involved in the case, calling for entirely new interpretations of the law of taxation as affecting land grants, the Court may very properly permit the defendants in error to be heard fully before the case shall be decided.

Had we seen the opposing brief before completing ours we should certainly have shaped our argument somewhat differently. What we have to say in oral argument will be in line with our printed brief, but yet we shall wish to present new argument (not new points or authorities) meeting more exactly the arguments contained in brief for plaintiff in error.

It is proper for us to say that we attach no blame whatever to Mr McKenney for failing to notify us in time. The circumstances were such as to lead any one into a mistake.

If the Court allow our application we desire to have the time set for a hearing, and we will then notify attorneys for the plaintiff in error, who may be present, if they desire, to reply.

Respectfully,

Willis Hand,
M. Barry,
Attorneys for Defendants in Error.

If this application be denied we shall be very well content with leave to file a supplemental Brief. Willis Hand

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 76.

WISCONSIN CENTRAL RAILROAD COMPANY,

PLAINTIFF IN ERROR,

vs.

PRICE COUNTY, ET AL., DEFENDANTS IN ERROR.

Now come the above named defendants in error, by their attorneys, Willis Hand and M. Barry, with John C. Spooner, of counsel, and upon the records of the Court and the affidavit of Willis Hand, Esq., hereto annexed and marked "Exhibit A," and move the Court for leave to present an oral argument to the Court in said cause, in support of the issues therein, on the part of the defendants in error, the time for the hearing of such argument to be fixed by the Court, and notice thereof to be given to the attorneys for plaintiff in error.

Dated November 12, 1889.

WILLIS HAND,
M. BARRY,
Att'ys for Defendants in Error.
JOHN C. SPOONER,
Of Counsel.

"EXHIBIT A."

DISTRICT OF COLUMBIA, *ss:*

Willis Hand, being duly sworn, on oath says that he is one of the attorneys for the defendants in error in the above entitled action, and that he has had the immediate charge of said action in said Court for the defendants in error.

Affiant alleges the following facts in excuse of the failure of attorneys for defendants in error to be present in time to take part in the oral argument of said cause when the same was regularly reached on the Docket, viz.:

Affiant and M. Barry, Esq., who are the attorneys for defendants in error, and who conducted the defense in said cause in the lower courts, reside in Price County, Wisconsin, and about twelve hundred miles from Washington, D. C. Said attorneys became members of the bar of this Court November 11, 1889. Hon. John C. Spooner has been, and is, counsel of record in said cause for the accommodation of said attorneys of defendants in error, and without assuming any responsibility in the case.

On or about October 14, 1889, affiant wrote a letter to Jas. H. McKenney, the clerk of this Court, asking him to state as nearly as he could the time when said cause would be reached for argument. In reply thereto affiant received a letter, of which the following is a copy, viz.:

"OFFICE OF THE CLERK,
"SUPREME COURT OF THE UNITED STATES,
"WASHINGTON, *Oct.* 16, 1889.

"WILLIS HAND, Esq.,
"PHILLIPS, WIS.

"DEAR SIR: Yours of the 14th inst. received. Case of the Wis. Cent'l R. R. Co., *vs.* Price County, No. 76, will probably be reached during the week beginning the 11th of November next.

"This is the best guess I can make at present. Will telegraph you in time for the argument.

"Yours truly,

"JAMES H. MCKENNEY,
"Per H. C. M."

Affiant relied wholly on said letter and particularly upon the promise therein contained to telegraph as to time when case would be reached, and he and Mr. Barry made arrangements to be present during the week commencing November 11th. Affiant and Mr. Barry did not desire to spend time unnecessarily waiting here for said cause to be reached, for the reason that a term of the circuit court for Price County was to be held, and in fact was held, commencing November 6, 1889, at which term Mr. Barry and affiant had numerous cases for trial.

On the morning of November 6, 1889, affiant received a telegram from Senator Spooner informing him that the clerk of this Court had wired that this cause would probably be reached on Thursday (Novenber 7). Affiant at once replied that he would start that day for Washington. Affiant also wired Mr. McKenney in regard to the case, and on the same day, November 6, received a reply from him, stating that the case would probably be reached on Friday (November 8); Mr. Barry and affiant then started for Washington on that day, November 6, and came through without delay, arriving here about 4 P. M., November 8, 1889.

On November 9 affiant came to office of the clerk of this Court, and for the first time saw the brief of plaintiff in error in the action. As the brief for defendants in error was already completed, and was filed on that day, no opportunity was afforded for specifically answering the arguments for plaintiff in error contained in brief of counsel on its behalf. On examination of said brief affiant discovered that some of the material points therein were

not fully met in the brief for defendants in error, or not so fully as may be done in case an oral argument shall be permitted on behalf of defendants in error.

Willis Hand

Subscribed and sworn to before me November 13th, 1889.

Chas B. Beall
Notary Public
~~Clerk Supreme Court.~~

Office Supreme Court U. S.
FILED
NOV 16 1889
JAMES H. MCKENNEY
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 76.

WISCONSIN CENTRAL RAILROAD COMPANY,

PLAINTIFF IN ERROR,

vs.

PRICE COUNTY AND THE COUNTY CLERK AND COUNTY TREASURER OF PRICE COUNTY,
DEFENDANTS IN ERROR.

ADDITIONAL BRIEF FOR DEFENDANTS IN ERROR.

WILLIS HAND,
M. BARRY,
Attorneys for Defendants in Error.

F. B. CLARKSON, PRINTER, 1012 PENNA. AVE., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 76.

WISCONSIN CENTRAL RAILROAD COMPANY,

PLAINTIFF IN ERROR,

vs.

PRICE COUNTY ET AL., DEFENDANTS IN ERROR.

ARGUMENT.

I.

In presenting to the Court this additional or supplemental brief for the defendants in error, we shall endeavor to confine ourselves carefully to meeting and answering the arguments of counsel for plaintiff in error, as set forth in their printed brief.

At the opening it may be well to say that there is no contention as to the effect of the acts of the legislature of Wisconsin of the year 1866, and later, conferring the land grant involved in this action, upon the plaintiff in error. It is understood and conceded that those acts conveyed

the lands covered by section 3, of the act of Congress of May 5, 1864, as fully and completely to the plaintiff in error, subject to the terms and conditions of the Congressional grant, as such Congressional grant had previously conveyed said lands to the State of Wisconsin.

This is so stated, substantially, in the brief for plaintiff in error, on page 3.

II.

We desire at this time to call particular attention to the fact, shown by the Record at folios 334, 396, that eleven of the forties described in the complaint were and are in the granted or place limits of the grant.

Upon no possible theory advanced by plaintiff in error can these few forties be held to have been exempt from taxation in 1883. These will be mentioned further later on.

III.

The fourth assignment of error by the attorneys for plaintiff in error, as shown on page 11 of their brief, is as follows:

"The learned supreme court of Wisconsin erred: In holding that the lands were not, in 1883, exempt from taxation under the provisions of acts of Congress May 5, 1864, and Aug. 6, 1856."

All we understand by this claim, or proposition, is, that inasmuch as the right of the plaintiff in error to the lands in question in this action rested and rest upon said acts of Congress, and because such right was denied in 1883 by the Government, therefore said lands were exempt, that is, not taxable, that year. From the manner in which the proposition is argued in the brief for plaintiff in error, we are unable to discover any other meaning to the claim

that the lands in question were "exempt" from taxation in 1883 by the terms of the acts of Congress referred to.

In this view of the assignment of error in question, the proposition as stated is so comprehensive as to include all of the principles and propositions discussed by the counsel for plaintiff in error in their brief.

In arguing this proposition counsel for plaintiff in error assert broadly:

"All of the public domain within the State remains exempt from taxation, except so far as the United States has voluntarily parted with title to the same, which act of segregation is ordinarily evidenced by a patent."

To this rule counsel admit there are exceptions in those cases where "(1) the land has been identified, (2) all acts have been done to entitle the grantee to a legal conveyance of the land, and (3) his right thereto has been recognized by the United States, so that he is at liberty to enter upon full enjoyment thereof, then the mere fact that there has been delay on the part of the Government in the issue of patent, will not prevent the land from becoming taxable as property of the grantee."

In support of these propositions a list of cases from the Federal and state courts is cited on pages 12 and 13 of brief for plaintiff in error.

An examination of the Federal cases there cited shows conclusively that the Federal courts do not make the distinction contended for.

In the Iowa cases particularly, the question of "segregation" of the lands has been discussed and passed upon several times; likewise, the Ohio supreme court has held that the lands must be "segregated" from the public domain before the State will be permitted to tax them.

To this we reply that this question is peculiarly a question for the Federal courts so far as lands of the United States are concerned.

If the courts of any given States choose to limit the right of that State to collect a revenue from lands obtained

from the Federal Government, until those lands are, technically and completely "segregated" from the public domain by the issue of a patent or a "patent-certificate," well and good; no one can complain except the State whose court imposes the limitation.

If the courts of any State prefer, in deference to Federal authority, to await the action of the Federal officials in the administration of the public lands, whether that action be *properly or improperly delayed*, well and good; no one can find fault except the State affected.

If the courts of such State prefer to recognize as binding every decision of the Federal officials made by them in the administration of the public lands, however *erroneous and unlawful such decisions may be*, well and good; only such States themselves can find fault.

Hence the decisions of State courts, holding that no "segregation" of lands from the public domain takes place until a patent or a patent-certificate shall issue, if there be such decisions, are to be given little, if any, weight in *this* Court in the examination of this proposition.

The question as to what constitutes a "segregation" of lands from the public domain for the purpose of identification, so far as we are able to discover, is an open one in this Court.

Our contention in this case is:

1. The question of "segregation" of the lands in question is irrelevent and immaterial.

2. Treating the question of "segregation" as relevant and material in the case, and still there was an actual and sufficient "segregation" of said lands prior to 1883.

These questions will be discussed further and more fully in this brief.

IV.

We now return to the rule that :

The Congressional and legislative grants, coupled with a performance by the plaintiff in error of all of the conditions of those grants long prior to the year 1883, operated to vest in the plaintiff the full equitable title to all of the indemnity lands, and particularly to the lands in question in this action *before* selection, and more especially after selection and *before* approval of the selections by the Secretary of the Interior.

We do not intend, now, to discuss this proposition at length, as we have done so in our former brief.

We present it again in order to call the attention of the Court to the unsoundness of proposition (2), on page 14, of plaintiff in error's brief. It is there said : " Unless every act made a condition to the perfect right to the land has been performed, the land will not be taxable." If we insert after the word " performed " the words "by the claimant " we shall have a sound proposition, and one in accord with the decisions of this Court already cited.

The *performance* must be by the claimant and by him alone, in order for the equitable title to become vested. It is idle to say that the claimant must or shall be left a victim to the mere caprice of an official of the Government.

But we advert to this proposition for the purpose of giving it prominence in the consideration of this case.

Counsel for plaintiff in error have placed great emphasis on their proposition that the refusal of the Secretary of the Interior to approve the lists for patent operated to suspend the equitable title and prevented it from vesting in the plaintiff.

Their whole argument hinges upon this.

We not only endeavor to meet them on this point but assert another one of equal importance in the case, viz: That the equitable title became vested by virtue of the grants and the building of the road and *without* approval of selections.

Here is a contract between the United States and the plaintiff. On the part of the United States it is agreed that the plaintiff shall have all the lands owned by the United States in October and December, 1869, (the respective dates of the location of the line and withdrawal of the lands from market), within certain lines *forty* miles apart, *provided*, only, that all of such lands shall be required to make up ten sections to the mile of the road to be constructed.

The grant of these lands is upon certain conditions to be performed by the plaintiff company, who accept the grant upon the conditions named, agreeing to perform them.

These conditions were fully and completely performed by the plaintiff in error in 1877.

This *performance* by the plaintiff of the conditions of the grant *constituted* a *payment* of the full consideration for the lands in *both limits* in this case where all the lands in the indemnity limits were required to make up the deficiency in place limits As a deduction from the foregoing principles and facts we conclude: That the question of a *technical* "segregation" or *technical* identification of the lands is irrelevant and immaterial in this case.

The lands which were the subject of the contract were easily ascertained, in accordance with fixed and plain rules contained in the granting acts, and no mere technicality can be allowed to defeat the performance of the terms of the contract. In other words, no mere technicality can be allowed to deprive one party to the contract of the fruits of its labors in performing the contract on its part.

In this connection we call attention to the language of this court in *Witherspoon vs. Duncan*, 4 *Wall.*, 220, in speaking of the taxation of a donation entry:

"If they furnish proof to the register and receiver, of the proper land office of the settlement a removal of their father, and he was accepted, and the claim allowed, then they had an equal right to purchase the lands in question with this claim as with money. * * * They took upon themselves the risk of confirmation, and periled their title when they suffered the lands to be sold for non-payment of taxes. It does not appear why the patent was delayed; but the claim was *finally approved* on the original proofs, and the patent, when issued, related back to the original entry."

Also, note the following language of this court in *Hunnewell vs. Cass County et al.*, 22 *Wall.*, 479, in a case where patents were not issued until after the lands were assessed, viz.:

"We are the more inclined not to interfere in this case by the extraordinary remedy of injunction, because it is shown that as to all these lands, not only had all the dues to the United States been paid before final action of the State board of equalization, but patents had issed for all of them before this suit was brought. At the time, therefore, of filing this bill to prevent the collection of taxes on account of the interest of the United States in the lands on which they were levied, the United States had no interest in the lands which would forbid their being taxed, nor is it clear they had any when the lands were assessed."

This is the correct test: Had the United States any interest (other than the bare legal title) in the lands when they were assessed?

In the case at bar they clearly had not.

In *Coleman vs. Peshtigo Lumber Co.*, 30 *Fed. Rep.*, 317, a case that arose in Marinette County, Wisconsin, Dyer, J., says:

"The Court is of the opinion that the lands in question were taxable during the period intervening the date of their entry and the issue of their patent. * * * And the decisions are to the effect that the patent confirms the entry and relates back to the time of the entry."

In *Carroll vs. Safford*, 3 *How.*, 461, McLean, J., says :

"Suppose the officers of the Government had sold a tract of land, received the purchase money, and issued a patent certificate, can it be contended that they could sell again and convey a good title? * * * When sold, the Government, until the patent shall issue, holds the mere legal title for (to) the land in trust for the purchaser; and any second purchaser would take the land charged with the trust."

So here the plaintiff is the purchaser, and it had paid for the lands in full in 1877. The Government held merely the legal title in trust for the plaintiff till patents issued.

V.

In discussing the question of the approval by the Secretary of the Interior of selections of land from the indemnity limits, counsel for plaintiff, on page 20 of their brief, after claiming that the lands were not taxable till such approval was obtained, assert that :

"The approval or disapproval of the Secretary of the Interior is not a ministerial act, but a judicial act. Before he can approve selections he must pass judicially upon two principal questions, and must be able to return an affirmative answer to each. These questions are :

1. Has the applicant any right to select indemnity land?
2. If so, has the applicant the right to select the particular lands designated in the application?

Or, to state it in other words :

1. Are there deficiencies in the primary or "place" limits, entitling the applicant to ask indemnity?

2. If so, can the lands designed properly be taken to supply such deficiencies?"

Suppose we concede, for the purpose of the argument, that the functions of the Secretary of the Interior, in passing upon these two points, were judicial?

Still we reply that:

Prior to 1878 *the Secretary of the Interior had determined both of these questions in favor of the claim of the plaintiff.*

1. By the letter of Commissioner Williamson, and the reply to it by the Secretary of the Interior, in November, 1877 (Record, fols. 232–243), it appears that of the 1,337,383.93 acres of land in the odd number sections in the place limits, 951,281.93 acres had been disposed of on October 7, 1869, the date of filing a map of the definite location of the line of the road. This was a determination that the *deficiency* in place limits amounted to 951,281.93 acres.

By the same letters it appears that up to that time the plaintiff had received patents for only 203,459.62 acres, of *indemnity* lands, leaving a deficiency *at the time the Secretary refused to approve the lists in question in this action*, of 747,822.31 acres, to be made up out of the indemnity limits.

This was an official, and judicial, too, if you please, determination that *there was a deficiency*, to fill which the lands in question in this action *had then been selected.*

2. As we have already shown in our former brief, it was already determined by the Interior Department that the particular lands mentioned in the plaintiff's lists, were the lands which the plaintiff had a right to take from the indemnity limits to make up the deficiency in place. The lists were filed in the local offices, in December, 1876, and were then certified as *approved, etc.* With such certificates attached they were forwarded to the General Land Office at Washington, and presented to the Secretary of the Interior.

Here let us consider for a moment the course business of any kind must necessarily take in the Interior Department. When any piece of *merely clerical* work is to be done, like taking a long list of land and comparing it with the original records; piece-meal, one description at a time, does the Secretary of the Interior do it in person? When the clerical work is finished by the clerks in charge of that particular department, does the Secretary go all over it to see if it is correct? Clearly not. The Secretary does the work by the hands of his clerks, or subordinate officers. So here, the certificates of the registers and receivers, *as made* and filed in the General Land Office *were conclusive*, so far as particular selections were concerned, and left *nothing whatever* of a judicial nature to be done in the matter of *selection*.

3. But the record shows that *all* of the indemnity lands were needed to satisfy losses in place, and then there would be a deficiency.

One who is entitled to *twelve* apples has no occasion to *select* when there are only *ten* for him; or if there are just twelve set apart for him, and he is entitled to twelve, he does not stop to select, but he takes them all.

So here the records show conclusively and completely all the Government lands that were left in indemnity limits. A clerk could easily pick them out. When picked out and listed, the plaintiff took them all. Not a single forty was left; and then losses in place limits were not satisfied.

What, then, of a *judicial* nature was left for the Secretary of the Interior to do with reference to the particular descriptions claimed by plaintiff in the indemnity limits? *Nothing whatever.*

Therefore, good reason why he specified only one ground for refusing to approve plaintiff's lists for patent. *No other ground existed.*

On pages 24-27 of brief for plaintiff in error counsel have cited various opinions rendered by heads of the Land

Department tending to sustain the rule contended for, that no interest passes in indemnity lands until selection and approval of selections.

It appears from an examination of such citations that in the following opinions only the *legal* title to indemnity lands was under consideration, viz:

Sault St. Marie Canal, 8 *Op. Att'ys-Gen.*, 247.
Cape Mendocino Lighthouse Site, 14 *Op. Att'ys-Gen.*, 50.
Portage Land Grant, 14 Id., 645.
Northern Pac. R'y Co., *May* 26, 1883.
Same vs. DeGraff & Co., *May* 24, 1884.

As to what is said by his Honor Secretary Lamar, *In re Atlantic & Pac. R'y Co.*, August 13, 1887, we submit that a substantial difference existed between the grant in that case and the one now under consideration. In that case no withdrawal of indemnity lands was ordered and none took place. Here the indemnity lands were withdrawn for the use and benefit of the plaintiff; they were expressly set apart and devoted to plaintiff's use.

The settled practice of the Government is to withdraw indemnity lands from market, and hold them for the use of the railroad company.

See former brief, page 24-5.

The plaintiff company accepted the offer of a right to earn the land grant lands, for at first the Government merely held out the offer of a *right to earn* the lands, and after such acceptance and performance of the conditions annexed to the offer, the mere right to earn ripened into a full equitable title, and all the lands of the grant had then passed beyond the reach of the party making the offer, the Government. Then the Government became divested of all its *beneficial* interest in the lands *covered by the offer*, and it held the mere naked title in the trust for the other party to the contract. For these reasons anything that may have been said by the heads of the Land Department

or by the courts, on the subject of selection of indemnity lands, or approval of selections in *cases unlike this one*, ought not to rule this case.

VI.

On page 20 of brief for plaintiff in error, it is said that the approval of the Secretary of the Interior was one of the conditions "precedent to the complete right to have a patent issue."

This proposition in just this form comes nearer being fully sustained by the courts than any other proposition advanced by counsel for plantiff, which we have discussed.

In quite a number of cases this rule has been enforced.

But take notice, this refers solely to the legal title.

And now we have undoubtedly discovered the meaning of that requirement of the Congressional grant, that lists of lands selected from the indemnity lands shall be *approved for patent.*

The question of approval in no manner affects the status of the equitable title.

The refusal to approve merely *holds in abeyance* the legal title.

The *status* of the equitable title is determined by the conduct of the parties to the contract, and the fulfillment or non-fulfillment of the terms of the contract.

When *the right to have* the lists approved for patent is complete, then the full equitable title becomes vested.

One of the conditions upon which plaintiff accepted the grant was that selections of indemnity lands should be approved by the Secretary of the Interior before patent should issue. This was a part of the contract.

But it was never contemplated by the parties to the contract that such condition should affect the equitable title.

Furthermore, the Government will be sustained only in a *reasonable* enforcement of this condition. In order to withhold patents in the enforcement of such condition, the Secretary of the Interior must be supported by some substantial reason.

He cannot and must not act capriciously nor arbitrarily. If he do, and thereby wrong the plaintiff, the courts will right the wrong.

In the case at bar the *right to patents* was complete. Hence the equitable title was fully vested.

The refusal to approve suspended nothing but the legal title. Hence the lands were taxable in 1883.

Cases cited on page 37 of brief for plaintiff have no application here for the reason that *no consideration* was paid, nor to be paid, for the privileges granted. No contract relations existed between the Government and the parties interested.

VII.

On page 41 of brief for plaintiff in error, it is asserted that the lands were not taxable because the claim of plaintiff to them was disputed and enjoyment of them denied by the Government. This is an attempt to evade the real question. The question here is not *what property* is taxable, but what was the nature of the plaintiff's interest in the lands in 1883. If the Court determines that the plaintiff then had a "property" interest in the lands, the Wisconsin statute steps in and makes them taxable.

See page 54 of former brief, for provisions of statute and citation of cases.

It is under this proposition that counsel claim that the eleven forties in place limits were not taxable.

In reply we say, in any view of the law, those eleven forties were taxable in 1883. No selection was necessary and no approval.

No patent, even, was necessary, as legal title passed to plaintiff by virtue of the grants. The denial by the Secretary of the Interior of the right to a patent to those forties cut no figure, for he was *not authorized to refuse patents.*

Because those eleven forties were taxable in 1883, the judgment of the supreme court of Wisconsin must, *in any event*, be affirmed in part with *costs against the plaintiff.*

Of course we hope for an affirmance in full, but whatever conclusion the court shall reach as to the indemnity lands we trust the court will not overlook these eleven forties, and that the judgment will be affirmed as to them with costs.

Restatement of important points:

1. The grant, coupled with the acceptance of it by plaintiff, was a contract. Under this contract plaintiff had a right to earn all the lands offered. As soon as the road was built, according to the terms of the grant, the plaintiff had an absolute right to all of the lands belonging to the grant. The refusal of the Secretary to approve selections could not defeat the fulfillment of the contract on the part of the Government.

2. The Secretary of the Interior, in 1876-7, had determined all material questions, which were submitted to him by the grant in respect to approval of selections, in plaintiff's favor, except the one question upon which he erred, since decided in *Barney vs. Railway Co.*, 117 U. S.

3. The equitable title vested by operation of law as a result of the conduct of the parties.

4. Refusal to approve selections suspended only the *legal* title.

5. When the right to have its list approved for patent was complete, the full equitable title became fully vested in plaintiff.

6. Because the eleven forties were taxable in any event, the judgment must be affirmed in part, at least, with costs.

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